(21,109.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 345.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 No. 15122.

STATE
v.
MISSOURI PACIFIC RAILWAY CO.

Pleas before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the Capitol, in the city of Lincoln, in said State, on the seventh day of January, 1908.

Present: Hon. John B. Barnes, Chief Justice; Hon. Charles B. Letton, Hon. Manoah B. Reese, Judges.
Attest: HARRY C. LINDSAY, *Clerk.*

Be it remembered that on the 21st day of March, 1907, there was filed in the office of the Clerk of the said court a certain transcript in words and figures following, to-wit:

Caption.

Pleas before the Honorable Paul Jessen, Judge of the District Court in and for the County of Cass and within the Second Judicial District of the State of Nebraska, at a term thereof begun and holden in the City of Plattsmouth, on the 10th day of September, A. D. 1906.

Be it remembered, that heretofore on the 17th day of May A. D. 1906, there was filed in the Office of the Clerk of the District Court in and for the County of Cass and State of Nebraska and within the Second Judicial District thereof, a Petition, in words and figures following, to-wit:

2 In the District Court of Cass County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

The Plaintiff complains and alleges:

First. That the Defendant, The Missouri Pacific Railway Company, is a corporation duly organized and authorized to do business in the State of Nebraska; that said defendant has constructed and now operates lines of railroad in Cass County, Nebraska, and has so operated such lines of railroad for a number of years last past; that defendant has established stations along said line of railroad, and established and for a number of years has maintained and now maintains a station, depot and side tracks at the village of Manley in Cass County, Nebraska, and at such station receives from the public for

shipment grain, merchandise and stock, and there transacts a general freight business.

Second. That the Manley Coöperative Grain Association of Manley, Nebraska, is a corporation duly organized and authorized to transact business in Cass County in the State of Nebraska and is authorized to buy, sell and ship grain, buy, construct and lease elevators for the storage and shipment of grain of all kinds, and secure real estate for the location thereof; that said The Manley Coöperative Grain Association is now in the active business of buying, selling, and shipping grain over the road of defendant Railway Company.

Third. That the said The Manley Coöperative Grain Association of Manley, Nebraska, requested of said defendant a site on the right of way of defendant on which to build an elevator for receiv-
3 ing and shipping grain, which request was denied, whereupon said The Manley Coöperative Grain Association secured the control of land adjacent to the right of way of defendant at Manley, Nebraska, constructed an elevator thereon with a capacity of not less than Fifteen Thousand bushels of grain, and on the 9th day of February A. D. 1906 notified said railway company, defendant herein, that said The Coöperative Grain Association had completed its elevator and was ready to receive grain and ship it from said elevator, and requested defendant to erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of defendant's right of way where the said The Manley Coöperative Grain Association had constructed its said elevator, so said Association could load cars from said elevator and ship the same over the road of defendant.

Fourth. That more than sixty days have elapsed since the serving of said notice and request, and the said defendant Railway Company neglected and refused and still neglects and refuses to erect, equip and maintain a side track or switch to the said elevator of The Manley Coöperative Grain Association of suitable length, to approach as near as four feet of the outer edge of defendant's right of way, against the form of the Statutes in such case made and provided.

Fifth. That hereby the defendant became indebted to the plaintiff in the sum of Five Hundred Dollars, whereby an action accrued to the plaintiff according to the provisions of Section One (1) and One *e* (1*e*) of Chapter 72 Art. 5 Compiled Statutes of Nebraska for 1905.

Wherefore, Plaintiff demands judgment against the defendant in the sum of Five Hundred Dollars with costs of action.

4 THE STATE OF NEBRASKA,
By C. A. RAWLS, *County Attorney.*

STATE OF NEBRASKA, *County of Cass, ss:*

C. A. Rawls being first duly sworn on oath says he is the County attorney of Cass County, Nebraska; that he knows the contents of the foregoing petition and says the allegations therein contained are true as he verily believes, and that he brings this action in the name of the State of Nebraska.

C. A. RAWLS.

Subscribed and sworn to before me this 17 day of May, A. D. 1906.

JAMES ROBERTSON,
[SEAL.] *Clerk of the District Court,*
By JESSIE M. ROBERTSON, *Deputy.*

And afterwards on the 18th day of June A. D. 1906 there was filed herein a Demurrer in words and figures following, to-wit:

In the District Court of Cass County, Nebraska.

STATE OF NEBRASKA, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Demurrer.

Now comes the defendant and demurs to the plaintiff's petition filed herein for the following reasons:

5 First. Because this court has no jurisdiction of the subject matter of this action, nor authority of law to hear, try or determine the issues thereof.

Second. Because the plaintiff has not the legal capacity to sue or maintain this action. Also because said plaintiff is not the real party in interest, nor has any beneficial interest in the event of the suit.

Third. Because the petition shows on its face that Article 5 of Chapter 72 of the Compiled Statutes of Nebraska of 1905 *is* unconstitutional and void.

Fourth. Because said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendant.

Fifth. Because said petition shows on its face that Article 5 of Chapter 72 of the Compiled Statutes of Nebraska of 1905, under which plaintiff claims the right to recover, is violative and in contravention of and repugnant to Article 14 of the Amendments to the Constitution of the United States, which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A. N. SULLIVAN,
JAMES W. ORR, &
B. P. WAGGENER,
Attorneys for Defendant.

6 And afterwards on the 11" day of September A. D. 1906 there was entered in District Court Journal "V" on page 10, an Entry in words and figures following, to-wit:

STATE OF NEBRASKA
vs.
THE MO. PAC. RY. CO.

And now on this 11th day of September A. D. 1906, it being one of the days of the regular September 1906 term of this Court this cause came on to be heard upon the Motion of both parties made in open court that a jury be waived in the case and cause be tried to the Court, and the Court being well and fully advised in the premises doth sustain said motion.

And afterwards on the 23rd day of October A. D. 1906, there was filed herein An Amended Answer, in words and figures following, to-wit:

In the District Court of Cass County, State of Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Amended Answer.

Now comes the defendant and, for its Amended Answer to the plaintiff's Petition filed herein, says:

First. That it admits that it is now and at all of the times mentioned in said petition was a railway corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and doing an interstate railway and traffic business in the States of Nebraska, Kansas, Missouri, Arkansas, Louisiana, Texas and Colorado, operating lines — railway into and through
7 each and all of the above named States, and engaged in an interstate carrying trade of freight and passengers. That it admits that the Manley Co-operative Grain Association of Manley, Nebraska, is a corporation, duly organized and authorized to transact business, and thereon alleged that said The Manley Co-operative Grain Association aforesaid is and at all of the times mentioned in said petition was engaged in the purchase, elevation, storage and shipment of grain among the different States and over the different railroads, and was engaged in an interstate business.

Second. Further answering, this defendant says that this court has no jurisdiction of the subject matter of this action, and no authority of law to hear, try and determine the issues thereof.

Third. Further answering, this defendant says that it specially denies that the Manley Co-operative Grain Association has constructed an elevator of the capacity of fifteen thousand bushels nor has it in any manner complied with Chapter 72 of the Compiled Statutes of Nebraska for the year 1905, and for that reason plaintiff ought not to have or maintain its said action.

Fourth. Further answering, this defendant says that the State of

Nebraska has not the legal capacity to sue or to maintain this action; that it is not the real party in interest.

Fifth. That the plaintiff ought not to have or maintain its said action for the reason that it seeks to recover under and by virtue of Article 5 of Chapter 72 of the Compiled Statutes of Nebraska, 1905, which provides, among other things, viz:

"Equal Facilities—Grain Elevator—Produce—Shippers.—Every railroad corporation shall give to all persons and associations reasonable and equal terms for the transportation of any merchan-
8 dise or other property of every kind and description upon any railroad owned or operated by such corporation within this State, and for terminal handling the use of the depot and other buildings and grounds of such corporations, and at any point where its railroad shall connect with any other railroad, reasonable and equal terms and facilities of interchange, and shall promptly forward merchandise consigned or directed to be sent over another road connecting with its road, according to the direction therein or accompanying the same; and every railroad company or corporation operating a railroad in the State of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made, shall erect and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, o- handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act must have a capacity of not less than fifteen thousand bushels. And such railroad company shall supply cars to individuals shipping their own grain on an equality with persons, associations, or corpora-
9 tions, owning, operating or controlling such elevators or engaged in the business of buying and shipping by loading directly into the cars.

"Violation of Act.—Any railroad company, officer or agent thereof who willfully violates or evades any of the provisions of this Act, shall be liable to the party injured for all damages sustained by reason of such violation, and, in addition thereto, shall be liable for each offense to a penalty of five hundred dollars ($500.00), which may be recovered by the county attorney in an action brought in the name of the state of Nebraska in any county by an action in the District Court, where such railroad company or corporation is doing business."

That said provisions of said Act of the legislature of the state of Nebraska are in contravention of and repugnant to the constitution of the state of Nebraska in this, to-wit:

That they violate Section 15 of Article 3, which provides:

"The legislature shall not pass local or special laws in any of the following cases: * * * to any corporation, association, or individual any special or exclusive privileges, immunity or franchise whatever."

Also:

"In all other cases where a general law can be made applicable no special law shall be enacted."

That Section 1 of said Chapter 72 of Article 5, above set forth, provides, among other things, as follows:

"Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act must have a capacity of not less than fifteen thousand bushels," which said provision granted special and exclusive privileges and immunities or franchises to a class of corporations, individuals or associations, engaging in the elevator business in said state, and is prohibited by said Section 15 of Article 3 of the Constitution.

Sixth. Because said Article 5 of Chapter 72 of the Compiled Statutes of Nebraska, under which the plaintiff claims right to recover, is violative, in contravention of and repugnant to Section 3 of Article 1, known as the Bill of Rights of the Constitution of the State of Nebraska, which provides:

"No person shall be deprived of life, liberty or property without due process of law."

Seventh. Said plaintiff ought not to have or maintain its said action, because said Article 5 of Chapter 72 of the Compiled Statutes of Nebraska, 1905, is violative of and repugnant to Section 21 of Article 1 of the Constitution of the state of Nebraska, which provides:

"The property of no person shall be taken or damaged for public use without just compensation therefor."

That Section 1 of said Chapter 72, Article 5, provides, among other things:

"And every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made, shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling

and shipping grain to all persons or associations so erecting or operating such elevators, or handling or shipping grain."

That said provision attempts to and, if enforced, would take the private property of this defendant and damage it, without compensation therefor, and would require this defendant to expend large sums of money and to part with and encumber its private grounds and right of way without compensation, for the private use of a private corporation.

Eighth. Said plaintiff ought not to have or maintain its said action, because said Article 5 of Chapter 72 of the Compiled Statutes of Nebraska of 1905 is violative and in contravention of and repugnant to Article 14 of the Amendments to the Constitution of the United States which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That it is provided by said Article 5 of Chapter 72 that the defendant company shall without compensation and without due process of law, part with the use of its private grounds and right of way for the benefit of another, shall expend large sums of its
12 money, and shall thereafter continue to maintain and operate a railway track, without compensation, for the private benefit of a private corporation, known as the Manley Coöperative Grain Association, which is a private concern.

That Chapter 72 denies to this defendant,—being within the jurisdiction of the state of Nebraska, the equal protection of the laws, in that it requires it to part with its private property and money, and to continue to expend its time and money in operating and maintaining a railroad track on its own private grounds for the private advantage of a private corporation, which requirement is made of no other class of citizens of the State of Nebraska.

Ninth. This defendant further answering, says that said plaintiff ought not to have or maintain its said action, because said defendant is a corporation organized under the laws of the State of Missouri, engaged in a freight and passenger carrying business between the different states of the Union and is engaged in interstate traffic; that the said The Manley Co-operative Grain Association is and at all of the times mentioned in said petition was likewise engaged in buying, elevating, handling and shipping grain into and through the various states of the Union and thereby, with reference to the matters and things contained in plaintiff's petition, engaged in interstate traffic; that Section- 1 and 1 E of Article 5 Chapter 72 of the Revised Statutes of the State of Nebraska, 1905, are in violation of and repugnant to that part of Section 8 of Article 1 of the Constitution of the United States, which provides:

"The congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes,"

ED PAGES

and of the acts of congress passed in relation thereto in car-
13 rying into effect said provisions of the Constitution, and because congress has legislated upon the subject mentioned in said plaintiff's petition, and has sole and exclusive jurisdiction and authority in relation thereto, and that said sections of said Article 5 of said Chapter 72 of the Compiled Statutes of Nebraska for 1905 is an attempt, on the part of the legislature of the State of Nebraska to regulate commerce between the states and is therefore inoperative and void.

Wherefore this defendant prays to be dismissed herefrom, with its costs of suit.

A. N. SULLIVAN,
JAMES W. ORR, AND
B. P. WAGGENER,
Attorneys for Defendant.

STATE OF KANSAS, *Atchison County, ss:*

James W. Orr, being first duly sworn, on his oath says that he is one of the duly authorized attorneys for the above named defendant, The Missouri Pacific Railway Company, a railway corporation; that he has read and knows the contents of the foregoing Amended Answer, and that the statements, averments, allegations and denials therein contained are true, as he is informed and verily believes.

JAMES W. ORR.

Subscribed and sworn to before me this 22" day of October 1906. My commission expires February 3rd, 1909.

CORA N. TERRY,
Notary Public.

[SEAL.]

14 And afterwards on the 23" day of October A. D. 1906 there was filed herein a Reply in words and figures following, to-wit:

In the District Court of Cass County, Nebraska.

THE STATE OF NEBRASKA
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Reply to Amended Answer.

Now comes the plaintiff and for reply to the amended answer filed herein by the defendant:

First. Replying to paragraph First of defendant's answer as amended and denies that the Manley Co-operative Grain Association is engaged exclusively in the transaction of an interstate business, and also denies that defendant is exclusively engaged in an interstate business.

Second. Replying to the Second, Third, and Fourth paragraphs

of defendant's amended answer denies each and every allegation therein contained.

Third. Replying to the Fifth paragraph of defendant's amended answer, plaintiff denies that the statute therein recited is in contravention of or repugnant to any part of the Constitution of the State of Nebraska,

Fourh. Replying to the Sixth paragraph of the amended answer of defendant, denies that Article Five of Chapter Seventy-two of the Compiled Statutes of Nebraska is violative of, in contravention of, or repugnant to any part of the Bill of Rights of the Constitution of the State of Nebraska.

Fifth. Replying to the Seventh paragraph of the amended answer of defendant, plaintiff denies that said statute is violative of, or repugnant to Section Twenty-one of Article *of* One of the Constitution of said State, and denies that said provision if enforced will take any of defendant's property or damage it, or would require defendant to part with or encumber its private grounds or right of way without compensation for the private use of a private corporation.

Sixth. Replying to the Eights paragraph of said answer, plaintiff admits that the quotation from Article Fourteen of the amendments of the Constitution of the United States is correct, and denies each and every of the other allegations in said paragraph contained.

Seventh. Replying to the Nineth paragraph of said answer, plaintiff admits that the quotation from Section Eight of Article one of the Constitution of the United States is correct, and denies each and every other allegation in said paragraph contained.

Eighth. Further replying to said answer, plaintiff alleges that defendant has not in its transactions with said Manley Co-operative Grain Association, nor in its answer to the petition of plaintiff acted in good faith, but in that behalf plaintiff alleges defendant has at all times attempted and now is seeking to aid the owners of the elevators situated on its right of way at Manley Nebraska to unlawfully monopolize the traf-ic of the purchase and shipment of the grain at said station, and to prevent the farmers and the said association from securing a share of said traf-ick or receiving just and fair prices for their grain.

Wherefore plaintiff prays for the relief asked in its petition.

THE STATE OF NEBRASKA,
By C. A. RAWLS, *County Attorney.*

STATE OF NEBRASKA, *County of Cass, ss:*

C. A. Rawls being first duly sworn on oath says he is County Attorney of Cass County, Nebraska; that he brings this action in the name of the State of Nebraska, knows the contents of the foregoing reply and says the allegations therein contained are true as he verily believes.

C. A. RAWLS.

Subscribed in my presence and sworn to before me this 23rd day of October A. D. 1906.

JAMES ROBERTSON,
Clerk District Court.

[SEAL.] By JESSIE M. ROBERTSON, *Deputy.*

And afterwards on the 17" day of December A. D. 1906 there was filed herein an Order, in words and figures following, to-wit:

In the District Court of Cass County, Nebraska.

THE STATE OF NEBRASKA
vs.
THE MISSOURI PACIFIC RAILW COMPANY.

Now on this 23rd day of October A. D. 1906 it being one of the days of the regular September A. D. 1906 term of this Court, this cause came on for hearing, and Defendant upon request, is given leave to file an amended answer instanter, and plaintiff upon request is given leave to file an amended reply thereto during the day.

The cause was then called for trial to the Court, a jury having been waived; and was submitted to the Court upon the pleadings,
17 the evidence adduced by both parties to the action, and oral arguments by counsel, whereupon the Court took the matter under consideration, permitting defendants to submit further arguments by written brief within ten days, and plaintiff to reply thereto by written brief within two weeks thereafter.

By the Court.

PAUL JESSEN.

And afterwards on the 20" day of December A. D. 1906, there was entered in the Court's Journal a Decree in words and figures following, to-wit:

STATE OF NEBRASKA, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Decree.

And now on the 20th day of December A. D. 1906, it being one of the days of the regular September A. D. 1906 term of this Court, this cause came on for decision, the Court having taken said cause under advisement and the Court being fully and well advised in the premises, and in consideration of the evidence and argument of council the Court finds, the issues in favor of the Plaintiff, and the Court finds the Defendant guilty as charged in the complaint.

It is therefore, considered, ordered and adjudged that plaintiff have and recover from the defendant the sum of $500.00 together with costs of this action taxed at $——.

To all of which defendant excepts and 40 days from the rising of the Court is given to prepare and serve Bill of Exceptions.

Motion for new trial filed on the 20th day of December A. D. 1906.

18 And afterwards on the 20th day of December A. D. 1906, there was filed herein a Motion for New Trial in words and figures following, to-wit:

In the District Court of Cass County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Motion for New Trial.

Now comes the defendant and moves the Court to set aside and vacate the decision of the court heretofore rendered in the above entitled case, and to grant to said defendant a new trial, for the following causes, affecting materially the substantial rights of this defendant:

1st. Because the findings of the Court are not sustained by sufficient evidence.

2nd. Because the decision of the court is contrary to law.

3rd. Because the findings and judgment of the court are contrary to law.

4th. For errors of law occurring at the trial, and which were duly excepted to by the defendant at the time.

5th. Because the Court erred in finding and holding that Article 5 of Chapter 72 of the Compiled Statutes of Nebraska, 1905 is constitutional.

6th. Because the court erred in holding that this court had jurisdiction of the subject matter of this action, and authority of law to hear, try and determine the issues thereof.

7th. Because the Court erred in holding that the proceedings and statutes upon which this action is based are not repugnant to nor in contravention of the Constitution of the United States and the amendments thereto.

19 8th. Because the Court erred in not rendering judgment in this cause for the defendant and against the plaintiff.

Affidavits, records and oral evidence will be used on the hearing of this action.

A. N. SULLIVAN,
JAMES W. ORR, &
B. P. WAGGENER,
Attorneys for Defendant.

And afterwards on the 12th day of March, A. D. 1907, there was entered in Court Journal "V," at page —, an Entry in words and figures following, to-wit:

THE STATE OF NEBRASKA, Plaintiff,
vs.
THE MISS. PAC. RY. CO.

And now on this 12th day of March, A. D. 1907, it being one of the days of the regular February A. D. 1907, term of this Court, this cause came on to be heard upon a motion for a new trial and in consideration of the argument of counsel and the Court being fully advised in the premises doth overrule said motion to which ruling the defendant excepts and forty days — given to prepare and serve bill of exceptions and judgment ordered on the verdict.

It is therefore, considered by the Court here that plaintiff recover of the defendant the sum of $500.00, the penalty provided by law, together with costs of suit taxed at $——, to all of which defendant excepts.

Adjournment.

The September, A. D. 1906 term of the District Court in and for Cass County, Nebraska and within the Second Judicial District thereof, on the 21st day of December, A. D. 1905, adjourned *sine die.*

20 STATE OF NEBRASKA, *County of Cass, ss:*

I, James Robertson, Clerk of the District Court, in and for Cass County, Nebraska and within the Second Judicial District thereof do hereby certify that the above and foregoing Transcript, consisting of Petition, Demurrer, Motion, Amended Answer, Reply, Order, Decree, Motion for New Trial and Entry on same, is a true, accurate and compared copy of the files and records as they are to be found in my office.

In witness whereof, I have hereunto set my hand and caused to be affixed the seal of said Court at Plattsmouth, this 15th day of March, A. D. 1907.

[SEAL.]

JAMES ROBERTSON,
Clerk District Court.

Fees 6.10

Endorsed: 15122 State *v.* Mo. Pac. Ry. Co. Transcript. Supreme Court of Nebraska Filed March 21, 1907. H. C. Lindsay, Clerk.

21 And afterwards on the same day there was filed in the office of the Clerk of said Supreme Court a certain Præcipe, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Præcipe.

To the Clerk of the Supreme Court of the State of Nebraska:

Kindly issue Notice of Appe-l in the above cause, directed to the sheriff of Cass County, Nebraska, to be served upon the above named appellee or its attorney of record, C. A. Rawls, to be returnable according to law, notifying said appellee and its attorney of record, and each of them, of this appeal from a judgment rendered by the District Court of Cass County, Nebraska, on the 12th day of March, A. D., 1907, in an action therein pending wherein the State of Nebraska was plaintiff and the Missouri Pacific Railway Company was defendant, for the sum of five hundred dollars ($500.00) and costs of suit. The attorney of record of said appellee in said District Court in said cause was C. A. Rawls of Plattsmouth, Nebraska, assisted by J. L. Root, also of Plattsmouth, Nebraska.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By JAMES W. ORR,
A. N. SULLIVAN,
B. P. WAGGENER,
Attorneys for Appellant.

22 Endorsed: 15122 State *v.* Mo. Pac. Ry. Co. Præcipe. Supreme Court of Nebraska Filed Mar. 21, 1907. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Assignment of Errors, in the words and figure- following, to-wit:

In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Brief and Assignment of Errors Complained of.

Now comes the appellant and alleges and complains that heretofore, and on the 12th day of March, A. D. 1907, being one of the days of the regular February A. D., 1907, term of the District Court of Cass County, Nebraska, a judgment was rendered against this appellant by the consideration of the District Court for the sum of five hundred dollars ($500.00) penalty, together with costs

of suit, and this appellant alleges and complains that the rendition of such judgment, and of the proceedings relating thereto, are erroneous and prejudicial to the substantial rights of this appellant,—a true correct and complete transcript of the record and a bill of exceptions containing the errors complained of are hereto attached, marked "Exhibit A" and made a part hereof.

That said judgment is erroneous in the following particulars, viz:

23

First.

Because said court below erred in overruling appellant's demurrer to the petition (transcript pp. 3-4-5 and 6), to which ruling of the court the appellant below at the time duly objected and excepted.

Second.

Because the court below erred in overruling the appellant's motion for new trial, to which it duly objected and excepted at the time (record pp. 12/13 and 17).

Third.

Because the said District Court of Cass County, Nebraska, had no jurisdiction of the subject matter of this action, nor authority of law to hear, try or determine the issues thereof, such authority being vested in the Interstate Commerce Commission and in the United States courts exclusively.

Fourth.

Because article 5 of Chapter 72 of the Compiled Statutes of Nebraska, under which said action was brought in the District Court of Cass County, Nebraska, is in contravention of and repugnant to section 15 of article 3 of the Constitution of the State of Nebraska, which provides:

"The legislature shall not pass local or special laws in any of the following cases: * * * to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever."

Also:

"In all other cases where a general law can be made applicable no special law shall be enacted."

Fifth.

Because section 1 of article 5 of chapter 72 of the Compiled Statutes of Nebraska, 1905, is violative and in contravention of article 1 of the Constitution of the State of Nebraska, which pro-

24 vides;

"The property of no person shall be taken or damaged for public use without just compensation therefor."

Sixth.

Because said section 1 of article 5 of chapter 72 of the Compiled Stat-es of Nebraska, 1905, is repugnant to and in contravention of section 1 of article 14 of the Amendments to the Constitution of the United States, which provides:

"* * * No state shall make or enforce any law which shall abridge the privileges of immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Seventh.

Because the State of Nebraska is not the real party in interest, nor has said state beneficial interest in the result of said action, nor has it the legal capacity to sue or maintain said action.

Wherefore this appellant prays that said judgment so heretofore rendered may be set aside and held for nought, and that said act of the legislature, being section 1 of article 5 of chapter 72 of the Compiled Statutes of Nebraska, 1905, be declared unconstitutional and void, and that this appellant be granted a new trial and restored to all things lost be reason of said judgment.

A. N. SULLIVAN,
JAMES W. ORR, &
B. P. WAGGENER,
Attorneys for Appellant.

Endorsed: 15122 State *v.* Mo. Pac. Ry. Co. Assignments of Error. Supreme Court of Nebraska Filed Mar. 21, 1907. H. C. Lindsay, Clerk.

25 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Waiver of Notice and Voluntary Appearance in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Waiver of Issuance and Service of Notice of Appeal.

Now comes the appellee, by C. A. Rawls, its attorney of record, and hereby waives the issuance and service of notice of appeal in the above entitled cause, and hereby enters the appearance of said appellee in the Supreme Court of the State of Nebraska in said cause.

STATE OF NEBRASKA,
Appellee,
By C. A. RAWLS, *Its Attorney.*

Dated at Plattsmouth, Nebraska, March 20th, 1907.

Endorsed: 15122 State *v.* Mo. Pac. Ry. Co. Waiver Supreme Court of Nebraska Filed Mar./21, 1907. H. C. Lindsay, Clerk.

26 And on the same day, to-wit, March 21, 1907, there was filed in the office of the Clerk of said Supreme Court a certain Bill of Exceptions in the words and figures following, to-wit:

District Court of the Second Judicial District of Nebraska.

Paul Jessen, Judge, Nebraska City and Plattsmouth

John S. Taggart, Reporter.

In the District Court of Cass County, Second Judicial District of Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Defendant's Bill of Exceptions.

Appearances.

For Plaintiff, Messers. C. A. Rawls and Jesse L. Root.
For Defendant, Messers. James W. Orr and A. N. Sullivan.

Received of A. N. Sullivan, Esq., for examination and amendment, a draft of a Bill of Exceptions in the case of The State of Nebraska, plaintiff, against The Missouri Pacific Railway Company, defendant, tried in the District Court of Cass County, Nebraska, at the regular September Term, 1906, thereof.

Dated at Plattsmouth, Nebraska, this 9 day of March, 1907.

C. A. RAWLS,
Attorney for Plaintiff.

I herewith return the draft of a bill of exceptions in the above entitled cause, submitted to me on the 9 day of March, 1907, and propose amendments as follows:

No suggestions of amendment.

27 Case No. —. Filed in District Court, Cass County, Neb. Mar. 15, 1907. James Robertson, Clerk.

Dated at Plattsmouth, Nebraska, this 11 day of March, 1907.

C. A. RAWLS,
Attorney for Plaintiff.

Received the within Bill of Exceptions of C. A. Rawls, Esq., this — day of ——, 1907.

——— ———,
Attorney for Defendant.

In the District Court of Cass County, Second Judicial District of Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Defendant's Bill of Exceptions.

Appearances.

For Plaintiff, Messers. C. A. Rawls and Jesse L. Root.
For Defendant, Messrs. James W. Orr and A. N. Sullivan.

Be it remembered, That at the September Term, A. D., 1906, of the Cass County, Nebraska, District Court, to-wit: on the 23rd day of October, 1905, that being one of the days of the said term, on the hearing of the above entitled cause of The State of Nebraska, plaintiff, against The Missouri Pacific Railway Company, defendant, in the District Court of Cass County, in the Second Judicial District of Nebraska, the above named plaintiff and the above named defendant, each to maintain the issues of their respective parts, adduced evidence, and all of said evidence, with the objections thereto, and the grounds for such objections, and all the rulings of the Court on such objections, and all the exceptions to such rulings made and taken at the time, having been by said defendant reduced to
28 writing within the time allowed therefor by the Court in this its bill of exceptions, and the same having been served on the attorney for the plaintiff, for examination and amendment, the said defendant now prays the Honorable Judge before whom said cause was heard, that this its Bill of Exceptions may be settled, allowed, signed, sealed, and made a part of the record of the aforesaid cause in the aforesaid Court.

And the plaintiff, to maintain the issues on its behalf to be maintained, adduced evidence as follows:

JAMES W. ORR, being produced and duly sworn, on behalf of plaintiff, testified as follows:

Examined by Mr. RAWLS:

1 Q. What is your profession Mr. Orr?
A. Lawyer.
2 Q. Are you connected with the legal department of the Missouri Pacific?
A. Yes sir.
3 Q. How long have you been connected with that department?
A. 20 years.
4. Q. Are you acquainted with J. O. Phillipi?
A. Yes sir.
5 Q. What official position does he hold with the Missouri Pacific?

A. I think he is the assistant general freight and passenger agent.
6 Q. And where does he reside?
A. Omaha.
7 Q. Is the territory in this part of the State, in which Cass County is, within his jurisdiction?
A. I think so.
8 Q. Are you acquainted with Mr. A. W. Sullivan?
A. Yes sir.
9 Q. In what capacity does he act for the road?
29 A. He is General Manager for the entire system.
10 Q. J. Russel, do you know him?
A. Yes sir.
11 Q. What position does he hold?
A. Superintendent.
12 Q. Does his jurisdiction cover Cass County?
A. I think it does.

Witness excused.

E. E. Hilton, being produced and duly sworn, on behalf of the plaintiff, testified as follows:

Examined by Mr. Rawls:

13 Q. What official position do you occupy in Cass County?
A. County Surveyor.
14 Q. How long have you occupied that position?
A. About eleven years.
15 Q. As such surveyor have you had occasion to observe and obtain correct information as to the general map of Cass County, as to its railroads and towns and highways?
A. Yes sir.
16 Q. I will ask you if you have had occasion during the time of your official life as surveyor of this County to plat the County?
A. I have platted all the towns in the County.
17 Q. You may look at this map I show you marked Exhibit "1" and state whether or not that correctly exhibits the townships, sections, location of the railroads and villages of the County?
A. Yes sir I think it does.
18 Q. Upon what scale Mr. Hilton is this map drawn?
A. Looks like it was five-tenths of one inch to the mile. That is a half inch to the mile.

Mr. Rawls: The plaintiff offers Exhibit "1" in evidence.
(Ex. "1" received without objection, same being found at page 89 hereof.)

30 19 Q. Mr. Hilton I hand you the plat marked Exhibit "2," and ask you to state what that is?
A. It's a plat of the town of Manley.
20 Q. Does it show the railroad track there?
A. Yes sir.
21 Q. That is a correct plat is it?
A. Yes sir.

22 Q. That shows the sidetracks and switches of the Missouri Pacific Railway there?

A. Shows a portion of them. I don't know that it shows all the tracks that are there now, it shows all that were there at the time the plat was made.

Witness excused.

J. B. CLEGHORN, being produced and duly sworn, on behalf of the plaintiff, testified as follows:

Examined by Mr. RAWLS:

23 Q. Where do you reside Mr. Cleghorn?

A. A little south of Manley, Nebraska.

24 Q. How long have you resided there?

A. Six years.

25 Q. How long have you resided in Cass County, Nebraska?

A. Well, I have only been in Cass County, about six years the last time.

26 Q. You resided in Cass County prior to that?

A. Yes sir, prior to that I lived in Louisville awhile.

27 Q. Do you know when the Missouri Pacific Railway was constructed through Manley?

A. Pretty near, yes sir.

28 Q. What time?

A. The main part of the construction was done in '81 and '82.

29 Q. Not prior to that time?

A. I think not sir.

31 30 Q. Are you familiar Mr. Cleghorn with the village of Manley and the railroad running through there, the switches, and the location of the depot?

A. Somewhat, yes sir.

31 Q. Look at this plat marked Exhibit "2" and state if you know whether that is a correct plat of the town of Manley, and of the railroad with its sidetracks and spurs as it now is, and as it was in October and November of last year, and up to this time?

A. Not exactly, no sir.

32 Q. Wherein is the difference?

A. The one difference I can see is that this spur track (indicating) on this side extends down a ways further than that.

33 Q. How much further, do you know?

A. I don't exactly, but I should judge about 250 feet perhaps.

34 Q. Then outside of the extension of this sidetrack west of the depot the balance of the plat is correct you say?

A. As near as I can tell, yes sir.

Mr. RAWLS: The plaintiff now offers Exhibit "2" in evidence.

Mr. ORR: Before objecting I would like to examine the witness. (Leave granted).

(By Mr. ORR:)

35 Q. Does that blue print correctly show the buildings on the right-of-way in the town of Manley?

A. Not all the buildings.

36 Q. Does it correctly show all of the sidetracks there as they are now or were last year?

A. I never measured that track there; the one on the west runs further down; these other two I know are there.

Mr. ORR: The defendant objects to introduction of Exhibit
32 "2" for the reason that is is shown by the testimony of the witness that it is not a correct illustration or map of the situation as it was in October last year or is now.

Mr. RAWLS: The plaintiff withdraws the offer.

Witness excused.

CHARLES A. CHANDLER, being produced and duly sworn, on behalf of the plaintiff, testified as follows:

Examined by Mr. RAWLS:

37 Q. Mr. Chandler what is your official position relative to the Missouri Pacific?

A. Assistant Engineer.

38 Q. Are you acquainted with the village of Manley and the railroad tracks there?

A. Yes sir.

39 Q. Do you know the width of the right-of-way through the village of Manley?

A. Yes sir.

40 Q. What is the width?

A. I think it is 200 feet, 100 feet on each side of the main track.

41 Q. Is there the same distance on each side of the track?

A. I believe not, it is 75 feet on the east side, and a hundred feet on the west side, is my recollection.

42 Q. Have you any memorandum of the sidetracks and right-of-way in the Village of Manley with you?

A. I have not, no sir.

43 Q. Have you made any measurements of them?

A. Not recently; I made some measurements there last February.

44 Q. Do you know what the extent of that is, whether that extends entirely through the Village of Manley, the width you have given?

A. I believe on the south end it doesn't extend quite as far.

33 45 Q. Do you know how far it extends?

A. I couldn't recall it without referring to some of my notes and maps.

46 Q. I will ask you to look at this paper I hand you (handing witness Exhibit "3") and state whether or not that is a correct exhibit of the railway track, and the right-of-way, the sidetracks and spurs and buildings along the right-of-way of the Missouri Pacific Railway Company at the Village of Manley, Cass County, Nebraska?

A. Yes sir it is.

47 Q. Which is the north Mr. Chandler?

A. The compass arrow on the margin of the map points to the north.

48 Q. What is the building furtherest north on the right-of-way?

A. I think the coal bin.

49 Q. And the next building south of that?

A. The next building south is an elevator.

50 Q. Whose is that?

A. I don't know.

51 Q. And the third building from the north?

A. That is the Company's depot.

52 Q. And the fourth building?

A. That is a coal bin.

53 Q. And the fifth building?

A. That's stock pens.

54 Q. And the next south of that?

A. That is an elevator.

55 Q. And what is the next south of that?

A. The next one is a corn crib.

56 Q. And the building to the extreme south?

A. That building is an elevator.

57 Q. That is the elevator of the Manley Cooperative Grain Association?

34 A. I believe it is. That is not on the right-of-way.

58 Q. It is adjacent to the right-of-way?

A. Yes sir.

59 Q. What is this line marked in red?

A. That was the proposed extension to the elevator spur.

60 Q. To the Manley Cooperative Grain Association's elevator?

A. Yes sir.

61 Q. Now can you tell what line indicates the sidetrack to the west as it now exists. Are the two parallel white lines to the west, running north and south, and west of the depot, does that indicate the extent of the sidetrack as it now exists?

A. Yes sir, that is the present sidetrack.

62 Q. The present terminus?

A. Yes sir.

63 Q. Can you point on this map the main line?

A. The main line on this map is represented by two *parellel* white lines between the elevator spur and the passing track on the east of the main line.

64 Q. Do you know how long that passing track is?

A. That is 1701 feet.

65 Q. Do you know how long the spur to the west is?

A. The spur to the west is in the neighborhood of 1500 feet.

66 Q. On this map what is the boundary lines of the right-of-way on each side?

A. The right-of-way lines are indicated by a shaded white line on east of the tracks and on the west of the tracks.

67 Q. Will you give the width of the right-of-way?

A. The width of the right-of-way is 137 feet on the west and 50 feet on the east of the original center line of the main track.

68 Q. That width you have given how long does that extend north and south?

A. That extends from the County road on the north running south entirely through the village.

69 Q. Do you know that length?

A. I believe it is 80 rods across this town. It is 80 rods.

70 Q. Does that same width still extend south of the elevator of the Manley Cooperative Grain Association?

A. Yes sir.

71 Q. Can you tell the distance Mr. Chandler from the south end of the elevator spur from the Manley Cooperative Grain Associaton's elevator?

A. It is 170 feet.

(By Mr. ORR:)

72 Q. To what point of the elevator is that measured?

A. From the south end of the elevator spur to the north end of the elevator.

(By Mr. ORR:)

73 Q. Is that the nearest end of the elevator?

A. Yes sir.

Mr. RAWLS: The plaintiff now offers in evidence Exhibit "3" about which the witness Chandler has been interrogated.

(Ex. "3" received without objection, same being found at page 91 hereof.)

(By Mr. ORR:)

74 Q. What is the length of the parallel red lines appearing on this blue print?

A. 450 feet.

(By Mr. RAWLS:)

75 Q. What is the scale of that map?

A. 100 feet to the inch.

(By Mr. ORR:)

76 Q. What is intended to be represented by the two parallel red lines that appear there?

A. That was the proposed extension of the elevator spur to the elevator.

(By Mr. ORR:)

77 Q. It seems to extend beyond the elevator. What is the purpose of that?

A. That was for the purpose of empty cars.

Witness excused.

J. B. CLEGHORN, being recalled, on behalf of the plaintiff, testified as follows:

Examined by Mr. RAWLS:

78 Q. Mr. Cleghorn are you a member of the Manley Cooperative Grain Association?
A. Yes sir.
79 Q. How many stockholders are there in that Association?
A. 50.
80 Q. State to the Court if you can the amount of farming land the members of this Association collectively own?

Mr. ORR: The defendant objects as immaterial.
The COURT: Overruled.
Exception.

A. Well, as near as I can estimate it is about 200 acres.
81 Q. To each member?
A. To each member.
82 Q. Of the 50 members belonging to the Association are they all land owners?
A. Not quite.
83 Q. How many are renters?
A. I think about five.
84 Q. All the balance of the 45 would own at least 200 acres upon the average, apiece, you think?
A. Yes sir.
85 Q. Mr. Cleghorn you may state to the Court how this
37 Manley Cooperative Grain Association came into existence?

Mr. ORR: The defendant objects as not the best evidence.
The COURT: Overruled.
Exception.

86 Q. State some of the facts.
A. The facts was that a good many of the members around there were dissatisfied with the price they got for grain compared with other markets, and the prices they got in different places away from there.

Mr. ORR: The defendant objects as hearsay, incompetent, irrelevant and immaterial, and not within the issues.
The COURT: State what you know of your own knowledge. So far as it is based on the reports gathered from others it is sustained.

87 Q. State the facts concerning the prices paid for grain by the two elevators there, Mr. Tighe's and Mr. Keckler's, at Manley, relative to the prices quoted in Omaha markets?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, hearsay, and not the best evidence.
The COURT: Overruled.
Exception.

A. There was from eight to ten cents difference.
88 Q. What do you mean by that? On what proportion?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, hearsay, and not the best evidence.
The COURT: Overruled.
Exception.

A. On the bushel.
89 Q. From 8 to 10 cents per bushel difference in the amount paid at Manley by either of the two elevators there and the quotations in the Omaha market?

38 Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, hearsay, and not the best evidence.
The COURT: Overruled.
Exception.

A. Yes sir.
90 Q. Mr. Cleghorn what was the difference of the price, if any, offered and given by the two elevators at Manley on the same grade of grain at the same time?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, hearsay, and not the best evidence.
The COURT: Overruled.
Exception.

A. Not any.
91 Q. Had you hauled grain to both of those elevators?
A. Yes sir.
92 Q. And received bids from both of them?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and leading.
The COURT: Overruled.
Exception.

A. Yes sir.
93 Q. What difference, if any, did the elevators at Manley offer you for grain of the same grade and character?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, hearsay, not the best evidence, and not within the issues.
The COURT: Overruled.
Exception.

A. Not any.
94 Q. Now Mr. Cleghorn, after the organization and incorporation of Manley Cooperative Grain Association, and after you had commenced to do business, I will ask you what difference there was in the price paid for grain at Manley by yourselves, and also the other two elevators, and that quoted in the markets at Omaha, Nebraska?

39 Mr. ORR: The defendant objects as incompetent irrelevant and immaterial, and not within the issues, and not the best evidence.
The COURT: Overruled.
Exception.

95 Q. It made a difference of about from two and a half to four cents.

96 Q. In what way?

A. They paid that much nearer the Omaha market.

97 Q. Two and a half to four cents more on what? Per bushel or per hundred pounds?

Mr. ORR: The defendant objects as leading and suggestive, incompetent, irrelevant and immaterial, and not the best evidence, and not within the issues.

The COURT: Overruled.

Exception.

A. Per bushel.

98 Q. What position do you hold in the Manley Cooperative Grain Association?

A. Secretary.

99 Q. How long have you held that position?

A. Ever since it was organized in 1904.

100 Q. Mr. Cleghorn, I will ask you to look at the paper marked Exhibit "4" and state what that is?

A. That is a copy of a letter I wrote.

101 Q. To who?

A. To Mr. Russell, the Superintendent.

102 Q. I will ask you to look at Exhibit "5" and state what it is?

A. It is the answer I got to that letter.

103 Q. You got the answer through the due course of mail?

A. Yes sir.

104 Q. And Exhibit "4," the letter you wrote, how did you send that?

40 A. I sent it through the mail.

105 Q. I will ask you to look at paper marked Exhibit "6," and state what that is?

A. That is another letter I sent to Mr. Russell and the answer to it.

106 Q. Exhibit "7," look at that and state what it is?

A. I received both of those, 7 and 8.

107 Q. I will ask you when you sent this relative to its date, if it is about the date that shows there?

A. Yes sir.

108 Q. Were these letters received about the date shown on the face?

A. Yes sir.

109 Q. How were they received?

A. Through the mail.

110 Q. Also the Exhibit- "4" and "5" I asked you about. Was Exhibit "4" sent about the date set forth?

A. Yes sir.

111 Q. And Exhibit "5" received about the date shown there?

A. Yes sir.

112 Q. And through the due course of mail?

A. Yes sir.

113 Q. Referring again to Exhibit "6" Mr. Cleghorn, the copy

you say of the original you sent, I will ask you if the original you sent was signed?

A. Yes sir.

114 Q. How was it signed?

A. Signed by me as Secretary of the Manley Cooperative Grain Association.

115 Q. Look at this paper marked exhibit "9," and state what that is?

A. That is a copy of a letter I sent to the same parties.

116 Q. Was that sent?

A. That was sent.

41 117 Q. When was it sent relative to the date it bears?

A. About that date.

118 Q. How was it signed, in the same way?

A. By me as Secretary.

119 Q. Exhibit "10," state what that is?

A. That is a copy of a letter I wrote to A. W. Sullivan General Manager of the Missouri Pacific.

120 Q. When was it sent?

A. Either the same day or the next day after it was written.

Cross-examination.

By Mr. ORR:

121 Q. Mr. Cleghorn what is your business?

A. Farmer.

122 Q. How long have you been engaged in farming?

A. Well, altogether about 16 years.

123 Q. Where?

A. The last six years I have been in Cass County; I was four years in Webster County, Nebraska; about six or seven years in Johnson County, Nebraska.

124 Q. When was the Manley Cooperative Grain Association organized?

A. Started in December, 1904.

125 Q. Can you give the names of the stockholders or of those who compose the corporation?

A. I have the names of the men who signed the articles of incorporation, and I also have a list of the stockholders.

126 Q. What was the purpose of this organization?

A. The purpose was to get a better market for our grain.

127 Q. It wasn't for the purpose of shipping grain to other

42 points?

A. Yes sir, if we could get more for it.

128 Q. It was for the benefit solely of its members?

A. No sir.

129 Q. How was it?

A. It was organized as a regular public corporation, my understanding of it.

130 Q. You mean it was organized under the laws of the State of Nebraska?

A. Yes sir.

131 Q. Who were your patrons?
A. Farmers in that vicinity.
132 Q. Anyone besides the members?
A. We started in that way, but we found we couldn't do business that way.
133 Q. What do you mean by that?
A. Our idea was to buy grain and sell it on the market, but it seems that our competitors,—anybody would come up there and ask us the price of grain, and they would go down to our competitors and they would overbid us a little and get the grain anyway.
134 Q. How much business did you do in the month of December, 1904?
A. Didn't do any.
135 Q. When did you first commence doing business?
A. Sometime in January, 1905, I believe.
136 Q. How much did you handle during that month?
A. We didn't ship any.
137 Q. I didn't ask you that?
A. I couldn't tell you the exact amount.
138 Q. What kind of grain did you handle?
A. We handled any kind.
139 Q. Did you, as a matter of fact, handle any kind?
A. I wouldn't say we handled every kind during the month of January, because I wasn't there.
43 140 Q. What were your duties in connection with this matter?
A. My duties was simply to act as clerk of the Board.
141 Q. Who attended to the business of the elevator?
A. Mr. Andrus.
142 Q. Who is he?
A. He is just the manager.
143 Q. Where does he reside?
A. Manley.
144 Q. Do you know anything about the volume of business done by this elevator during any month?
A. Well, I have it at home, but I couldn't tell you the amount done in one month.
145 Q. You say you were clerk of the Board?
A. Yes sir.
146 Q. What were your duties as clerk of the Board?
A. Simply to keep a record of the Board meetings and do what they told me to.
147 Q. You had nothing to do with the management of the elevator?
A. Only as to the records.
148 Q. You devoted none of your time to it?
A. Only when I went to meetings.
149 Q. The volume of the business or the character of the business you have no personal knowledge of?
A. I have some personal knowledge of it.
150 Q. Are you able to state anything as to the volume of business in any month?

A. I couldn't tell you the exact amount of business in any month. I have the reports at home.

151 Q. Those reports were made to you and not by you?

A. No sir.

152 Q. You have no means of knowing from personal knowledge whether the reports are correct or otherwise?

44 A. Only by looking over the books at times.

153 Q. Did you have any personal knowledge as to whether those reports were correct or otherwise?

A. No.

154 Q. So you don't know, as a matter of fact, anything about the volume of business at that elevator or any of the others?

A. Not of any month.

155 Q. How many elevators were doing business at Manley during the months you speak of?

The WITNESS: Which months?

Mr. ORR:

156 —. All the months?

A. First there was two elevators and a scoop house, lately there has been three elevators.

157 Q. Do you speak of yourself as one of the three?

A. Yes sir.

158 Q. That was the scoop house before?

A. We had a scoop house at first.

159 Q. Are you able to give the capacity of either or both of the other elevators on the line of the Missouri Pacific at Manley?

A. Not actually, only what I have been told.

160 Q. Were they open for business during all of the months that your concern has been running?

A. Yes sir.

161 Q. And operated were they?

A. Yes sir.

162 Q. Give the names of those who operated these two elevators other than yours?

A. Mr. John Tighe operated one of them.

163 Q. Who operates the other?

A. Harms & Keckler did operate it until lately.

164 Q. Is there any difference in the capacity of these two elevators?

A. I believe so.

45 165 Q. Which is the larger?

A. Harms & Keckler's.

166 Q. What is the capacity of that elevator?

A. I don't know exactly.

167 Q. State as near as you can?

A. I have been told it would hold 18,000 bushels.

168 Q. What is the capacity of the John Tighe elevator?

A. I have been told it would hold 12,000.

169 Q. Do you consider that reliable?

A. I should judge so.

170 Q. As I understand it your elevator is being operated for the advantage of the farmers in that vicinity who are members of your corporation?

A. Well, right at present it is, because we have no track to it.

171 Q. It has been all the time hasn't it?

A. Well, we have tried a couple of times to kind—a do business outside, but we have no trackage and couldn't handle the grain.

172 Q. Is your elevator being operated now?

A. Yes sir.

173 Q. During what period of time since January, 1905, has your elevator not been in operation?

A. I don't think there has been any time.

174 Q. What do you mean by saying you quit?

A. I mean we didn't try to buy outsiders' grain because we had no track to handle it on.

175 Q. You handled the grain of the members just the same?

A. Yes sir.

176 Q. And you shipped from there didn't you?

A. Yes sir.

177 Q. To what points do you ship?

46 A. Oh we ship to Kansas City, Saint Louis.

178 Q. Kansas City, Missouri, and Saint Louis, Missouri?

A. Yes sir. Some to Omaha.

179 Q. Omaha, Nebraska?

A. Yes sir.

180 Q. Where else?

A. We have shipped some to Atchison, Kansas.

181 Q. Shipped any to the seaboard anywhere?

A. I think not.

182 Q. Any to Chicago, Illinois?

A. I don't think so.

183 Q. Your shipments have generally been to Saint Louis and Kansas City, Missouri, and Atchison, Kansas?

A. Mostly.

184 Q. Over what railroad do you ship to Kansas City and Saint Louis?

A. Missouri Pacific.

185 Q. The defendant in this case?

A. Yes sir.

186 Q. Does it go over the rails and lines of the Missouri Pacific?

A. I suppose so.

187 Q. That is your understanding is it?

A. Yes sir.

Redirect examination.

By Mr. RAWLS:

188 Q. How do you get the grain from the elevator into the cars?

A. We load it in wagons and take it over and scoop it in the car. Sometimes we have a portable elevators that runs by horse power and sometimes we use that.

189 Q. Mr. Cleghorn in your capacity as secretary you do not do the buying and the selling of the grain?

A. No sir, Mr. Andrus attends to that.

47 Witness excused.

Mr. RAWLS: The plaintiff offers in evidence paper marked Exhibit "12," with the endorsement on the back, being a notice to produce.

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues in the case.

The COURT: Overruled.

Exception.

(Ex. "12" received, a copy of same found at page 101 hereof.)

Mr. RAWLS: The plaintiff offers in evidence Exhibit "13," being a notice and acceptance of service.

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues in the case.

The COURT: Overruled.

Exception.

(Ex. "13" received, a copy of same found at page 103 hereof.)

Mr. RAWLS: The plaintiff demands of the defendant the production in Court of a notice and request of the Manley Cooperative Grain Association, of Manley, Nebraska, that the defendant extend its sidetrack at the station of Manley, Nebraska, southward to a point adjacent thereto where said Grain Association proposed to erect an elevator on land adjacent to your right of way, said land controlled by said elevator Company, said notice and request being dated November 8th, 1905.

Mr. ORR: I will state that we have made diligent search for the papers described in the notice and are only able to produce
48 the two which I hand you, neither of which is one requested in this demand. (Mr. Orr handing papers to Mr. Rawls.)

Mr. RAWLS: Plaintiff now offers in evidence Exhibit "6" consisting of two sheets.

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not the best evidence, and not within the issues in the case.

The COURT: Overruled.

Exception.

(Ex. "6" received, a copy of same found at page 94 hereof.)

Mr. RAWLS: The plaintiff offers in evidence exhibits "7" and "8," being the answers to Exhibit "6."

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not the best evidence, and not within the issues in the case.

The COURT: Overruled.

Exception.

(Ex. "7" and "8," received, copy of Ex. "7" found at page 96, and Ex. "8" at page 97 hereof.)

Mr. RAWLS: The plaintiff also demands of defendant that they

produce the original of the request by letter dated, Manley, October 23rd, 1905.

Mr. ORR: We do not have it in Court.

Mr. RAWLS: The plaintiff now offers in evidence Exhibits "4" and "5."

Mr. ORR: Defendant objects as incompetent, irrelevant and immaterial, and not within the issues and not the best evidence.

The COURT: Overruled.

Exception.

(Ex. "4" and "5" received, copy of Ex. "4" found at page 92, and Ex. "5," at page 93 hereof.)

49 Mr. RAWLS: The plaintiff now demands of defendant to produce in Court the original of the notice dated Manley, Nebraska, January 12th, 1906, identified as Exhibit "9."

Mr. ORR: We haven't got it in Court.

Mr. RAWLS: The plaintiff offers in evidence Exhibit "9."

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues in the case, and not the best evidence.

The COURT: Overruled.

Exception.

(Ex. "9" received, a copy of same found at page 98 hereof.)

Mr. RAWLS: The plaintiff demands of defendant the production of the original of Exhibit "10" dated November 2nd, 1906.

Mr. ORR: We do not have it in Court.

Mr. RAWLS: The plaintiff offers in evidence Exhibit "10."

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not the best evidence, and not within the issues in the case.

The COURT: Overruled.

Exception.

(Ex. "10," received, a copy of the same found at page 100 hereof.)

Mr. RAWLS: The plaintiff now offers in evidence Exhibit "14" being the original Exhibit "11" and produced by defendant in response to the notice given.

(Ex. "14" received without objection, copy of same found at page 104 hereof.)

50 Mr. RAWLS: The plaintiff now demands of the defendant to produce in court to be used as evidence in this case, the contract of the defendant, Missouri Pacific Railway Company, with the owners of the elevators at Manley, Nebraska, which are located on the right-of-way of the defendant at that point, showing the conditions and terms by which they operate the elevators and occupy the right-of-way.

Mr. ORR: We haven't got them here in Court. I only got this notice yesterday and telegraphed for them and haven't yet received them.

A. E. JAMESON, being produced and duly sworn, on behalf of the plaintiff, testified as follows:

Examined by Mr. RAWLS:

190 Q. What is your business?
A. Contractor.
191 Q. Where do you live?
A. Weeping Water, Nebraska.
192 Q. How long have you been engaged in that business?
A. 22 years in this vicinity.
193 Q. What kind of a contractor are you?
A. Farm buildings, houses and barns.
194 Q. Mr. Jameson I will ask you if you have been called upon to take the measurements, for the purpose of showing capacity of the elevator, at Manley, Nebraska, owned by the Manley Cooperative Grain Association?
A. Yes sir.
195 Q. When was that?
A. I haven't the date, perhaps 60 days ago.
196 Q. Did you take such measurements?
51 A. Yes sir.
197 Q. Have you a record of that?
A. Yes sir.
198 Q. Will you please produce that?

(Witness produces book.)

199 Q. Did you compute the measurements?
A. I did. These (indicating) are the bins this (indicating) represents the number I found on the bins; this (indicating) represents the size of the bins in feet.
200 Q. The sheet before you, about which you are testifying, which shows a series of figures there. Just state what the column to the left indicates and what the figures 1, 2, 3 and 4 indicates?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not the best evidence.

Mr. RAWLS:

201 —. Can you tell Mr. Jameson the number of bins in that elevator and the capacity of each one, by refreshing your memory from the memorandum you took?
A. I can.
202 Q. State to the Court what those measurements are.
203 Q. (Mr. Orr interposing.) Are you testifying to your recollection as refreshed by that book, or testifying from the book?
A. Testifying from the book.

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial.
The COURT: Sustained.
Exception.

204 Q. (Mr. Rawls resuming.) Can you testify to those measurements by looking at the book and refreshing your memory?
A. Yes.
205 Q. Now refreshing your memory from the figures you put down at the time, state to the Court from your memory what the capacity of each of the bins were.

Mr. ORR: I would like to ask witness a question before
52 that question is answered.

(Leave granted.)

(By Mr. ORR:)

206 Q. Have you any independent recollection now after looking over that book of the numbers of the bins and the capacity of each?
A. Not individually of each bin.

(By Mr. ORR:)

207 Q. As a whole you would testify from that book?
A. Yes sir.

(By Mr. ORR:)

208 Q. Since looking at it you haven't so refreshed your recollection that you could testify without the book?
A. Not exactly to a bushel.

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, hearsay, and not the best evidence.
The WITNESS: I can give the capacity of the elevator as a whole.
The COURT: Objection overruled.
Exception.

(By Mr. RAWLS:)

209 Q. What is the entire capacity of that elevator?
A. 18,954 bushel-.

Cross-examination.

By Mr. ORR:

210 Q. How many bins are there?
A. I think 17.
211 Q. Do you know how many bins there are?
A. By looking at my book I can tell you. (Witness referring to book.) There is 17 bins, not including a bin which you might call a bin, which I call a booth.
212 Q. What are the sizes of those bins?
A. They vary.
213 Q. Give the size of 1.
A. 8 by 10 by 17.
214 Q. We will call that 1.
A. Yes sir.
215 Q. Are they numbered?
A. Yes sir.
53 216 Q. Give us number 1.
A. 8 by 10 by 17.

217 Q. Number 2.
A. 4 feet by 4 feet by 22 feet.
218 Q. Number 3.
A. 8 by 8 by 32.
219 Q. Number 4.
A. 4 feet by 4 feet by 22 feet.
220 Q. Number 5.
A. 8 by 8 by 32.
221 Q. Number 6.
A. 8 by 10 by 23.
222 Q. Number 7.
A. 8 by 8 by 32.
223 Q. Number 8.
A. 8 by 10 by 23.
224 Q. Number 9.
A. 8 by 8 by 32.
225 Q. Number 10.
A. Number 10 isn't there, it is a spout leading down that doesn't hold anything.
226 Q. Number 11.
A. 8 by 8 by 32.
227 Q. Number 12.
A. 8 by 8 by 32.
228 Q. Number 13.
A. 8 by 10 by 17.
229 Q. Number 14.
A. 10 by 10 by 23.
230 Q. Number 15.
A. That is a dump bin, 6 by 8 by 12.
54 231 Q. Number 16.
A. 6 by 8 by 8.
232 Q. Number 17.
A. 6 by 8 by 10. There is another bin yet.
233 Q. Number 18?
A. 4 by 8 by 16.
234 Q. What is the total capacity in cubic feet?
A. I haven't got it. I figured that on separate paper.
235 Q. How many cubic inches did you figure to a bushel?
A. I figured 2150.
236 Q. You are not able to give the total dimensions in cubic feet?
A. No sir.
237 Q. Will you kindly do that and answer that question later?
A. Give the number of cubic feet?

Mr. ORR:

238 —. Yes sir.
The WITNESS: Yes sir.
239 Q. Mr. Jameson, in giving these measurements, in making these measurements, where you say for instance a bin is 8 by 10 by 17, does it mean that that *bein* is square across the top, 17?
A. Yes sir, that's what the bin will square.

240 Q. Are these bins in construction square?

A. They are, except that some have slanting top; where they have slanting tops they are marked here and checked; those bins I have checked are two feet shorter by actual measure.

241 Q. To get the capacity you use a part of the slant?

A. Use the actual capacity of the bin.

242 Q. You use a part of the slant don't you? Assuming that the bin was something like that (indicating). Where would you square that?

A. In the center here.

243 Q. And use a part of the roof for the bin?

A. Yes sir.

244 Q. Do you know why it is built for that purpose?

A. I suppose it is,—there is room there, they can fill it if they want to.

55 245 Q. You use a part of the roof in making your measurements?

A. Yes sir.

246 Q. And include a part of the roof in the bin measure?

A. Yes sir.

247 Q. Was that built for containing grain, any part of the roof?

A. Yes sir.

248 Q. In that elevator?

A. Yes sir.

249 Q. In every place where you have secured the slant it was constructed for holding grain?

A. Yes sir.

250 Q. All of the cubic measure you have obtained in that way?

A. Yes sir.

251 Q. Mr. Jameson how are these bins constructed? Where are the studding?

A. The studding are on the inside of the bin; I have those figured off.

252 Q. How much did you take off for studding and lining?

A. It amounts to 309 bushels.

253 Q. In the entire elevator?

A. Yes sir.

254 Q. Where are these 17 bins located? Tell as near as you can how they are located in the building.

A. They are located principally on the e-st of the driveway. Some are located over the driveway, and of course the dump bin is under.

255 Q. Are these bins built with a hopper in them?

A. Some are built with hopper bottoms.

Witness excused.

A. JENKINS, being produced and duly sworn, on behalf of the plaintiff, testified as follows:

Examined by Mr. RAWLS:

56 256 Q. Where do you reside Mr. Jenkins?
A. Manley, Nebraska.
257 Q. How long have you resided there?
A. 22 years I think.
258 Q. Hold any official position there?
A. I am postmaster.
259 Q. Ever been assessor of that precinct?
A. Yes sir.
260 Q. How often?
A. I have been assessor there 11 times.
261 Q. You — well acquainted with the character of the farm land in and about the village of Manley?
A. Yes sir, I think I am.
262 Q. Just state in a general way Mr. Jenkins as to the character of the land as to being rolling or level or hilly and as to the roads leading in and out of Manley?
A. The land around Manley is gently rolling.
263 Q. How are the roads leading in and out of Manley?
A. All good.
264 Q. What proportion of the land in and around Manley is tillable?
A. Do you mean land that is in actual cultivation?

Mr. RAWLS:

265 —. Yes, about the proportion?
A. As near as I could state it would be near 75 or 80% of the land.
266 Q. You have made statistics of that have you?
A. Yes sir I have.
267 Q. What is the size of Manley, the population?
A. I think between 140 and 150.
268 Q. How many stores are there in that village?
A. Two general stores.
269 Q. How many coal yards?
A. Two.
57 270 Q. Lumber yards?
A. One.
271 Q. How many elevators are there now?
A. Three.
272 Q. Does that include the elevator of the Manley Cooperative Grain Association?
A. Yes sir.
273 Q. Mr. Jenkins are there any large feeders of stock in and about Manley, if you know?
A. No sir, there hasn't been in years back; there hasn't been a carload of stock for,—there has been stock shipped from there but they was fed out six or seven miles.

274 Q. Is there any feeding to any extent even at that distance?
A. No.
275 Q. What is done with most of the grain raised in and about Manley?
A. It is sold.
276 Q. Shipped from there?
A. Yes sir.

58 Cross-examination.

By Mr. ORR:

277 Q. What are the nearest points from which shipments can be made outside of Manley? What towns are located in the vicinity of Manley?
A. There is Weeping Water on one side.
278 Q. How far?
A. Five miles. Louisville is 6 miles, Murdock on the west is 7 miles, and Murray on the east is 12 miles.
279 Q. How large a place is Weeping Water?
A. I should say 1200, about that.
280 Q. Has it elevators?
A. Yes sir.
281 Q. A store?
A. Yes sir.
282 Q. How many elevators?
A. Two.
283 Q. Quite a number of stores?
A. Yes.
284 Q. That is 5 miles from Manley in which direction?
A. South.
285 Q. Railroad facilities at Weeping Water?
A. Yes sir.
286 Q. Missouri Pacific?
A. Yes sir.
287 Q. Any other railroad?
A. I think not.
288 Q. What is the next town you spoke of?
A. Louisville.
59 289 Q. How far is that?
A. Six miles.
290 Q. Which direction?
A. North.
291 Q. How large a place is Louisville?
A. I don't know.
292 Q. Large as Manley?
A. Oh yes, probably six or seven hundred.
293 Q. Has railroad facilities?
A. Yes sir.
294 Q. Elevator facilities?
A. Yes sir.
295 Q. How many?

A. I think there is one on the Missouri Pacific and one on the B. & M.

296 Q. How many railroads pass through Louisville?

A. Two.

297 Q. What are they?

A. Missouri Pacific and the Burlington.

298 Q. Those are both railroads operating lines beyond the State of Nebraska?

A. I suppose so.

299 Q. What was the other town you spoke of?

A. Murdock on the west.

300 Q. Is that a railroad station?

A. Yes sir.

301 Q. What railroad?

A. The Rock Island.

302 Q. How far is Murdock from Manley?

A. Seven miles.

303 Q. What is the size of Murdock?

A. Well I don't know, I should say four or five hundred, I wouldn't be positive.

60 304 Q. Larger than Manley?

A. Yes sir.

305 Q. How many elevators has Murdock?

A. Two I think. Wabash is 7 miles from Manley.

306 Q. The Chicago, Rock Island and Pacific Railway Company is the one you spoke of at Murdock?

A. Yes sir.

307 Q. Is that a railway Company operating in States beyond Nebraska?

A. I suppose so.

308 Q. What is the size of Wabash? And where is that with reference to Manley?

A. It is two miles south of Manley and five west.

309 Q. Is that a railroad station?

A. Yes sir.

310 Q. On what road?

A. Missouri Pacific.

311 Q. Are there any elevators there?

A. Two.

312 Q. What is the size of Wabash?

A. I think from 150 to 175.

313 Q. At least as large as Manley?

A. I should say about the same.

314 Q. Are you acquainted at all with the volume of elevator business done at Wabash?

A. No sir I am not.

315 Q. Some other town you spoke of?

A. That was Murray.

316 Q. That is about how far?

A. 12 miles from Manley.

317 Q. Which direction?

A. Right straight east, a quarter of a mile south.

61 318 Q. How large is Murray?

A. I should say about 300.

319 Q. Has railroad facilities?

A. Yes sir.

320 Q. What railroad?

A. Missouri Pacific.

321 Q. Do you know whether it has any elevators?

A. It has one and maybe two.

322 Q. How far is Elmwood from Manley?

A. 11 miles.

323 Q. In a southwesterly direction?

A. Yes sir.

324 Q. How large a place is Elmwood?

A. I should say seven—eight hundred.

325 Q. Has railroad facilities?

A. Yes sir.

326 Q. What road?

A. Missouri Pacific.

327 Q. How many elevators?

A. I think there is two, and I think the mills ship stuff.

328 Q. Isn't there three besides the mills?

A. I ain't sure.

329 Q. How far is South Bend from Manley?

A. 12 miles.

330 Q. In which direction?

A. Northwest.

331 Q. How large a place is South Bend?

A. About 100,—150 I guess.

332 Q. Has it more than one railroad?

A. Yes sir.

333 Q. What roads?

A. The B. & M., and the Rock Island.

62 334 Q. Any grain elevators there?

A. Yes sir, there is two, and there may be three, I wouldn't be positive as to that.

335 Q. How frequently have you visited these various places you speak of?

A. I am in Weeping Water maybe twice a week, sometimes maybe once a week, and some weeks I don't go at all.

336 Q. You get to about all these places during the year?

A. Yes sir.

337 Q. Are these elevators all in operation?

A. Yes sir, there is a buyer there all the time; I guess they are open for business all of the time.

338 Q. Are you in any manner connected with the Manley Co-operative Grain Association?

A. No sir.

Redirect examination.

By Mr. RAWLS:

339 Q. Mr. Jenkins you may state to the Court the condition of the roads going in and out of Manley, as compared to those going in and out of Weeping Water, Louisville and Wabash, as to which is the more hilly and more level?

A. The roads at Manley are better and more level than those at Weeping Water and Louisville; the roads going into Wabash are about the same as Manley, and also at Murdock.

340 Q. To the east of Manley, Murray is 12 miles?

A. Yes sir, about that.

341 Q. East of Manley in the territory tributary to Manley, I will ask you how the roads there are compared with the roads leading into Louisville or Weeping Water or Murray, that is whether they are more level and better to haul over?

A. Yes sir, they are better.

342 Q. To which point are they better?

63 A. To Manley.

343 Q. Do you know who are operating the elevators at Wabash?

A. Yes sir.

344 Q. Who?

A. Mr. Richards operates one and the Farmers Grain Association operates the other.

345 Q. At South Bend?

A. The Farmers operate one there, and I don't know who operates the other one or two.

346 Q. At Murdock?

A. I don't know their names there.

Witness excused.

FRANK STANDER, being produced and duly sworn, on behalf of the plaintiff, testified as follows:

Examined by Mr. RAWLS:

347 Q. Where do you reside?

A. I live on a farm right west of Manley.

348 Q. How long have you resided there?

A. 25 years.

349 Q. You are a farmer?

A. Yes sir.

350 Q. What proportion of the land around about Manley Mr. Stander is farm land?

The WITNESS: At the present time?

Mr. RAWLS:

351 —. Yes.

The WITNESS: I should judge there is about 75% of it.

352 Q. How much land do you own?

A. I own a section of land in the County.

353 Q. Mr. Stander you may state if you know whether or not there are any large feeders or shippers of stock near Manley?

A. There is a couple of feeders east of Manley, some of them have a few hogs.

64 354 Q. What is done with the greater portion of the grain that is raised in and about Manley?

A. Most of it taken to town and shipped.

355 Q. You live west of Manley?

A. Yes sir.

356 Q. Are you acquainted with the character of the roads that run in and out of Manley, Weeping Water and Louisville?

A. Yes sir.

357 Q. State to the Court what the character of the roads that run in and out of Manley are as compared with those running in and out of Weeping Water and Louisville, as to being level?

A. They are better there into Manley, but Wabash and Murdock are about the same.

358 Q. State what the roads east of Manley are, east of Manley running into Manley, as compared with those running south from that territory?

A. Better.

359 Q. What is the general average of corn per acre raised in and around there?

A. One year and another from 35 to 50 bushel per acre.

360 Q. Is there any wheat or oats raised for shipping?

A. Yes sir.

361 Q. About what is the average yield of wheat?

A. One year to another there—10 to 30 bushels.

362 Q. Of oats?

A. From 25 to 50 bushels.

Cross-examination.

By Mr. ORR:

363 Q. Mr. Stander do you live in Center Township?

A. Yes sir.

65 364 Q. How far west of Manley?

A. Two miles west and a half mile north.

365 Q. You live on the straight road to Murdock?

A. Yes sir.

366 Q. How far do you live from Murdock?

A. Four miles.

367 Q. The road is just as good to Murdock as it is to Manley?

A. No sir.

368 Q. The roads there are cut up with a good many streams and draws up around Manley?

A. They are from my place west.

369 Q. Calling your attention to Exhibit "1," the witness is asked to examine that map and state whether it fairly shows the streams and draws and broken land in the vicinity of Manley and Murdock and Weeping Water?

A. They are correct there where I live.

370 Q. Are they correct as far as you know?

A. Yes sir.

371 Q. The map shows quite a number of creeks and streams and considerable rough land in the vicinity of Manley?

A. Not right around Manley.

372 Q. Calling the attention of the witness to these irregular black lines that are supposed to represent streams and draws,—is that fairly represented?

A. I guess it is.

373 Q. This north and south line marked "Missouri Pacific," do you know whether or not that follows a stream?

A. A part of the way it does, and part of the — it don't.

374 Q. How is that represented on that map?

A. I guess all right.

375 Q. South of Manley there *is* a number of creeks in there?

A. Yes sir.

376 Q. And east of there there are a number of streams?

A. Yes sir.

66 377 Q. And down here in Eight Mile Grove Precinct, there are quite a number?

A. Yes sir.

378 Q. Manley is situated in about the central part of these creeks and draws?

A. It is about on what I could call the divide.

379 Q. All around it there are a number of creeks and draws?

A. Yes sir.

380 Q. That would effect the wagon road some?

A. Not to any extent.

381 Q. It is about the same in all directions from this map. The map shows that the creeks are distributed all around Manley?

A. Yes.

382 Q. And about equally so in all directions?

A. Yes.

383 Q. As I understood you to say the wagon roads to Murdock and Wabash and Elmwood are about the same as they are to Manley?

A. They are quite close to Murdock, they are good, but from my place to Murdock there are rough roads.

384 Q. You haul your grain to the town you can get the best price?

A. I haul all my grain to Manley. Unless it is a load of hogs then I sometimes haul to a different town.

385 Q. Are you interested in this grain association, The Manley Cooperative Grain Association?

A. No sir.

Redirect examination.

By Mr. RAWLS:

386 Q. Calling your attention to the map about which Mr. Orr has asked you, and with reference to the streams in and about Manley, I will ask you Mr. Stander if the streams don't,—from the

map,—the ones about which Mr. Orr asked you,—if they don't head in that vicinity and all of them run away in opposite directions from Manley.

A. They seem to all run away from Manley.

67 387 Q. Does the head of these little streams as indicated here affect materially the ground or the roads?

A. No sir.

388 Q. But as the stream progresses it cuts deeper and more rough?

A. Yes sir.

Witness excused.

C. M. Andrus, being produced and duly sworn, on behalf of the plaintiff, testified as follows:

Examined by Mr. Rawls:

389 Q. Where do you reside Mr. Andrus?

A. Manley, Nebraska.

390 Q. What is your business now?

A. Farmer, and also manager of the Farmer's Elevator.

391 Q. When was the Manley Cooperative Grain Association established?

A. It was organized in 1904.

392 Q. When was the elevator completed which you now have?

A. Completed in February, this year.

393 Q. 1906?

A. Yes sir.

394 Q. State to the Court how that elevator was constructed. Whether or not it has all the equipments for handling grain?

Mr. Orr: The defendant objects as leading and suggestive.

The Court: Sustained.

Exception.

395 Q. State to the Court the manner of the construction of that elevator, and what equipment it has for the handling of grain?

A. This elevator contains 17 bins, and we have an excellent engine, and we have a — and — that we have to elevate the grain to the top of the elevator which is distributed to the different bins; we have a driveway through the elevator and an elevator to dump the wagons.

68 396 Q. Is that the usual method of constructing elevators of that capacity?

Mr. Orr: The defendant objects as leading and suggestive, and immaterial.

The Court: Sustained.

Exception.

397 Q. What facilities, if any, have you for handling the grain into cars if there was a track adjacent to your elevator?

A. We have what we call a track spout running from the top of the elevator to throw the grain into the car.

398 Q. How do you now get it into the car?

A. Loading it in wagons.

399 Q. How did you load your grain last year?

A. We had a scoop house and we scooped the grain in this house and loaded it in wagons and took it out to the car.

400 Q. How many bushels did you load in that way?

A. We run this a year, and we had a little portable elevator the latter part of the year.

401 Q. How many bushels have you shipped from there before erecting your elevator?

A. About 50,000 bushels.

402 Q. Since your elevator was erected?

A. About 80 cars.

403 Q. About how many bushels to the car?

A. Something like a thousand bushels.

404 Q. Something like 80,000 bushels then?

A. Yes sir.

405 Q. How many elevators are there besides this in Manley?

A. Two.

406 Q. How are they located as to sidetracks?

A. The sidetracks come right by.

407 Q. The sidetrack to which grain from those elevators is carried, does that extend toward the elevator you have?

A. Yes sir.

69 408 Q. Is it the same sidetrack?

A. Yes sir.

409 Q. About what distance from your elevator is it to the end of the elevator next to you?

A. I should think about 180 feet from the far side of our elevator.

410 Q. I will ask you Mr. Andrus if you are the manager of this elevator?

A. Yes sir.

411 Q. You have charge of the selling of the grain and billing it out?

A. Yes sir.

412 Q. And ordering cars?

A. Yes sir.

413 Q. Where have you sold most of the grain you have shipped?

A. At Omaha.

414 Q. To what company?

A. Nebraska Hay and Grain Company.

415 Q. Is it in the course of your business with this Company, do you ship all of it directly to Omaha?

A. No sir.

416 Q. State to the Court the method in which you ship the grain.

A. I sell the grain to this party in Omaha, and he gives me a billing, and part of it goes south; I have shipped some to Omaha, but the bulk of it goes south.

417 Q. Your buyer in Omaha directs you where to bill the grain?

A. Yes sir.

418 Q. How many stockholders are there in this corporation?
A. I think about 50.
70 419 Q. Of that number how many are land owners?
A. I think they all own land except four or five.
420 Q. How much land would you say was the average that each of those stockholders, the 45, own?
A. I would say at least 200 acres.
421 Q. In shipping in the manner in which you have been shipping, state to the Court whether or not you have had any difficulty in securing cars as ordered by yourself for the purpose of shipping grain.

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues in the *acse*, no claim being made here about cars.
The COURT: Overruled.
Exception.

At this time a recess was taken until 1:30 o'clock p. m. today, October 23d, 1906.

At 1:30 o'clock p. m., October 23d, 1906, pursuant to recess heretofore taken, the trial of this case was resumed.

Mr. RAWLS:

422 —. Mr. Andrus you may now answer the last question I asked you before recess this morning.
The WITNESS: My answer to that question is "yes sir."

423 Q. Mr. Andrus you may describe to the Court the manner of applying for cars, and state what difficulties you met with relative to you- supply of cars?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues in this case.
The COURT: Overruled.
Exception.

A. Why so many details, I don't know as I can go into all of them. The rules, as I understand it,—we have to sign a book and give the number of cars we want at the time given, and also to state when we want them if we wish to state that, in that way we start to get what we want.
71 424 Q. Did you apply for cars in that manner?
A. Yes sir.
425 Q. Go on and state the result.

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues in this case.
The COURT: Overruled.
Exception.

A. In the beginning they didn't seem to want us to sign the book.

Mr. ORR: The defendant moves to strike out the answer as an impression of the witness, and hearsay.

The COURT: Sustained.

Exception.

426 Q. State whether you had any difficulty in regard to that?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues in this case.

The COURT: Overruled.

Exception.

A. On one occasion I went to the depot to sign for a car and as I went to sign the name of the company in the book the agent jerked the book away from me and said he didn't want that book all scribbled in the book.

Mr. ORR: The defendant moves to strike out the answer of the witness as not being material or responsive to any issue in the case.

The COURT: Overruled.

Exception.

427 Q. Go on.

A. I think it was after this occasion that I signed for a car,—there was cars came in and I didn't have any notice that there was any cars for us to load, and I saw several cars on the sidetrack and I asked him if those cars were not there to load, and he said
72 they were, and I asked him if we were not entitled to one, and he said not until the other elevator people had all they desired.

428 Q. Do you know whether at that time they had ordered cars.

A. I couldn't say positively but I think they had.

Mr. ORR: The defendant moves to strike out testimony of this witness as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in the case.

The COURT: Overruled.

Exception.

Mr. RAWLS:

429 —. Go on.

A. There was several instances of the same kind in regard to cars being set in there and I was wanting cars and being refused, as they said the other fellows had preference as long as they had anything to ship, and the agent informed me he wasn't fully instructed as to our rights on one occasion.

430 Q. At all the times you ordered cars state whether or not you had grain ready to ship?

A. Yes sir.

Q. Now you may state Mr. Andrus whether at any time the agent stated to you that there was a scarcity of cars and how they were distributed between you and the other elevator men at that point?

Mr. ORR: The defendant objects as incompetent, irrelevant, and immaterial, hearsay, and not within the issues, and leading.

The COURT: Overruled.
Exception.

A. He did at certain times.
432 Q. Give an illustration to the Court as to how many you would order and how many they would order and whether your order would be fil-ed before they got any?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, hearsay, and not within the issues, and leading.
The COURT: Overruled.
Exception.

73 A. They would step in there and order cars, place their name on the book sometimes as high as for ten cars apiece, which they——

Mr. RAWLS (interposing):

433 —. What do you mean by "they"?
A. The other two elevators. With our facilities for loading we couldn't load but about two cars a day, and they could load a good many more. He stated that we would have to divide the cars according to the grain we had in sight.
434 Q. Did they do that?
A. On some occasions.
435 Q. On all occasions?
A. No sir.
436 Q. What was done in regard to filling the entire order of the other two elevators before giving you any at times wh-n he said there was a scarcity of cars?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, leading, and not within the issues in this case.
The COURT: Overruled.
Exception.

A. When they signed for cars they would sign for a great number, and we would sign for what I could load, which would probably be two a day, and on one occasion he said there was a scarcity of cars and they had their full amount before we received a car.
437 Q. Mr. Andrus before you started the business of your corporation did you have a conversation with Mr. Phillipi?
A. Yes sir.
438 Q. Where?
A. Mr. Philippi's office.
439 Q. In Omaha?
A. Yes sir.
440 Q. State what that conversation was? What you requested of him and his reply?

74 A. I was sent to represent the Association, with another gentleman. We called on Mr. Phillipi and stated our object, what we intended to do there, and we asked the privilege of putting a scoop house on the right-of-way and for them to extend their track to it, and he said they would not do anything of the kind, that they

had enough elevators there and they didn't propose to give us any privileges.

441 Q. Was anything said about protecting the other elevators?

Mr. ORR: The defendant objects as leading.

The COURT: Overruled. Exception.

A. Said something about them having their money in there and had to be protected.

Mr. ORR: The defendant moves to strike the answer out as incompetent, irrelevant and immaterial, and being a mere opinion of the witness.

The COURT: Overruled.

Exception.

442 Q. Mr. Andrus had you been engaged in the business of selling grain before you went into business for the Farmers Elevator Company?

A. Yes sir.

443 Q. You may state to the Court if the price offered by these two elevators for the same class of grain was different or always the same?

A. It was always the same to me.

444 Q. Prior to the time of the establishment and the entering into business of the Manley Cooperative Grain Association, state what the difference in the prices offered at Manley by the two elevators there for grain was, from that of the prices quoted in the market in Omaha?

Mr. ORR: The defendant objects as immaterial, and not the best evidence.

The COURT: Overruled.

Exception.

75 A. On one occasion I recall there was 4 cents difference a bushel.

445 Q. At any other time did you have occasion to observe the difference in prices?

A. Not particularly, I guess.

446 Q. You do recall that one time of it being four cents different?

A. Yes sir, I notice the difference in the markets quite often.

447 Q. Since your company has gone into business and conducting business what has been the difference in price between the price paid at Manley, and that quoted at Omaha generally?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues, and not the best evidence.

The COURT: Overruled.

Exception.

A. It's been from two to four cents, that is on corn I'm speaking of now, on wheat is ten to twelve.

448 Q. Your shipments be mostly of grain?

A. Yes sir.

449 Q. Mr. Andrus what is the manner of conducting the business of the sales of grain that comes to your association there? To whom do you sell?

Mr. ORR: The defendant objects as immaterial.
The COURT: Overruled.
Exception.

A. I sell to different parties.
450 Q. Mostly?
A. Mostly to the Nebraska Hay and Grain Company of Omaha.
451 Q. Your sales were delivered on the car there at Manley?
A. Yes sir.
452 Q. Mr. Andrus, I will ask you to state to the Court whether or not at any time your orders having been given from day to
76 day and not filled, were subsequently filled entirely? Orders for cars?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial.
The COURT: Overruled.
Exception.

A. Yes sir.
453 Q. Give an illustration to the Court.

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues in the case.

454 Q. State how many times you ordered cars and how many cars each time, and when you got those cars and what the agent told you in regard to using the entire amount sent to you at the time they came?

Mr. ORR: The defendant objects as incompetent, irrelevant and immaterial, and not within the issues in the case.
The COURT: Overruled.
Exception.

A. On one occasion I was signing for cars and had quite a lot of grain to be handled, and I signed for two cars a day for about 6 or 7 days for my use, and it run along about 10—12 days before I received a car; there was at that time then 14 cars set in for me to load, and the agent notified me he would give me 48 hours in which to load those 14 cars, and in case I didn't there would be a penalty charged.
455 Q. Why did you order two a day?
A. That's about our capacity for loading.

Cross-examination.

By Mr. ORR:

456 Q. You say you sometimes asked for cars that were set
77 in there at the station, and you were told that you couldn't have them until the other elevators had been supplied?
A. Yes sir.

457 Q. Those were cars theretofore ordered by them?
A. On one occasion it was not.
458 Q. On every occasion except that one?
A. I couldn't say as to that.
459 Q. You have named all the petty annoyances you suffered?
A. No sir.
460 Q. The fact that you ordered a car and did not get it you considered an annoyance?
A. Yes sir.
461 Q. And when you got more than you ordered you complained?
A. Yes sir.
462 Q. And you complained once when the agent got you so many cars you had to pay demurrage on them?
A. Yes sir.
463 Q. There wasn't any shortage of cars then?
A. The agent claimed there was before that.
464 Q. You know that there sometimes is a car famine?
A. Yes sir, I knew we couldn't get cars.
465 Q. You knew that others that wanted cars couldn't get them?
A. I think so.
466 Q. The elevators you think they were trying to protect were very often without cars when they were really needing them?
A. I presume so.
467 Q. If that was the condition they were treated the same as you were?
A. If that is the case they were.
468 Q. You believe that is true?
A. No sir.
469 Q. You believe the other elevators always got their
78 cars as they wanted them?
A. It seemed as though they did.
470 Q. You believe that do you? That the other elevators never had any delays about getting cars?
A. I wouldn't think they did.
471 Q. Those things will happen to anyone in the elevator business,—delays in getting cars, and delays in getting them to market and so on?
A. I should judge they were.
472 Q. In that respect you were no different from anyone else?
A. We don't know about that.
473 Q. You say you recollect one time that there was a difference of four cents between the price paid at Manley and that paid at Omaha. Do you know what the freight rate was from Manley to Omaha?
A. I am pretty sure I know.
474 Q. What was it?
A. I thought before we started it was 4 cents a bushel, but found since it is not.
475 Q. You say the bulk of your grain was sold through somebody in Omaha. Who was that?

A. Nebraska Hay and Grain Company.
476 Q. You sold all of your product through that concern?
A. No sir.
477 Q. Some of it you sold yourself?
A. I sold it to other commission firms.
478 Q. You sold some to this commission firm?
A. Yes.
479 Q. *Sole* to them the same as other people?
A. More so.
480 Q. Only you sold a greater portion of it to them than to others?
A. Yes sir.
79 481 Q. Only in a different manner?
A. Yes, I consigned some to Kansas City, and also sold some to Omaha.
482 Q. Any to St. Louis to be sold on the market?
A. Yes sir.
483 Q. Any to Atchison to be sold on the market?
A. *Sole* some direct to Atchison too.
484 Q. In any case you made out the billing wherever it was going?
A. Wherever I was instructed, yes sir.
485 Q. And it was a shipment from the Manley station to Kansas City, or St. Louis, or Atchison, or Omaha?
A. Yes sir.
486 Q. You stated something about the elevator there, the manner of its construction. What are the outside dimensions of that elevator?
A. 34 by 26.
487 Q. What is the height*h*?
A. Well now it varies.
488 Q. What is the height*h* from the ground?
A. Well it must be,—I don't know,—it must be around 50 feet.
489 Q. You are talking about the tower. What is the length from the base to the roof?
A. I think 32 feet; two 16 foot lengths.
490 Q. Don't you know as a fact that it is 28 feet?
A. No sir.
491 Q. You are certain it is 32?
A. I am pretty sure.
80 492 Q. Is there any basement to it or cellar?
A. Yes sir.
493 Q. Do the bins run down in the basement?
A. Yes sir.
494 Q. How deep?
A. They run some of them as high as 8 feet.
495 Q. And you say here are 17 of them?
A. 17 bins in the elevator, yes sir.
496 Q. The outside dimension is what?
A. I think 32 feet.
497 Q. The square?
A. 34 by 26.

498 Q. And you think it is 32 feet to the roof of the elevator?
A. Yes sir.
499 Q. And there are 17 partitions in it?
A. Yes sir, I should judge about.
500 Q. In addition to these 17 bins there is stairs?
A. A stairway, yes sir.
501 Q. And office?
A. No sir.
502 Q. Any other room there that is not used for storing grain?
A. No other room but what could be.
503 Q. On the plan that you could put it in this Court Room?
A. Yes sir.
504 Q. Elevator capacity you wouldn't consider any more than there is in the bins?
A. Oh yes, I have used some space in cleaning.
505 Q. How much space is there you use in cleaning?
A. There is space there that could be used, it is about 10 by 24 feet.
81 506 Q. That is not used generally for elevator purposes?
A. That is what we call the work room?

Redirect examination.

By Mr. RAWLS:

507 Q. Did you ever fill your elevator full of grain?
A. Pretty near.
508 Q. Did you weigh the grain as you put it in?
A. Yes sir.
509 Q. How many bushels did you put into that elevator by weight at one time?
A. I weighed in there at one time 16,230 bushels.
510 Q. That amount of grain was all in the elevator at one time?
A. Yes sir.

Recross examination.

By Mr. ORR:

511 Q. In shipping this grain to Kansas City and St. Louis and to Atchison, Kansas, over what line of railroad were these shipments made?
A. Missouri Pacific.
512 Q. The defendant in this case?
A. Yes.

Witness excused.

A. E. JAMESON, being recalled, on behalf of plaintiff, testified as follows:

Examined by Mr. RAWLS:

513 Q. Mr. Jameson have you finished the computation Mr. Orr requested of you?
A. Yes sir.

Cross-examination.

By Mr. ORR:

514 Q. You may state what it is?

A. I reduced the size of each of those bins in the elevator
82 into cubic feet.

515 Q. What was the result?

A. The result I have here I will give you.

516 Q. What is the total number of bushels?

A. You said of each bin individually.

517 Q. What are the outside dimensions of that elevator?

A. I didn't measure the outside dimensions. I was only asked to measure the bins.

518 Q. Is there any of that elevator that is not used for elevator purposes for storing grain?

A. The driveway and engine room.

519 Q. That is taken out of the elevator itself?

A. It is not included in my measurement, my measurement includes bins only.

520 Q. What is the heighth of this elevator?

A. Couldn't tell you.

521 Q. What is the depth of the hopper in each one of them? Do they vary?

A. I think they do.

522 Q. Did you measure that in each instance?

A. Yes sir.

523 Q. What is the average depth?

A. Four of those hoppers are alike; they are four feet deep, the hopper part I think on number- 3, 5, 7, and 9.

524 Q. What is the average on the others?

A. The others I don't know the average on those, those four I wouldn't be able to state, the other two are dump bins.

525 Q. No hoppers?

A. Yes, sir; I have them numbered here 15 and 16; on
83 those bins I found numbered 1 to 14, not including 10, and numbers 15, 16, 17 and 18 are my numbers.

526 Q. Is there a basement in this *builgin?*

A. Yes sir.

527 Q. Did you go into that?

A. Yes sir, the hoppers are in there.

528 Q. They go below the wall line do they?

A. Yes.

Witness excused.

C. M. ANDRUS, being recalled, on behalf of plaintiff, testified as follows:

Examined by Mr. RAWLS:

529 Q. Mr. Andrus what is the character of the lay of the land from the end of the spur track, the elevator track, to where your elevator is built?

A. Why it is practically level, very little raise.

530 Q. Referring again to the *elevator*. Is the engine room and office a part of the elevator or in a wing?

A. The engine room is attached; there isn't any office.

531 Q. Where is the driveway?

A. It is through the main building.

Witness excused.

Here the plaintiff rests.

And the Defendant, to maintain the issues on its behalf to be maintained, adduced evidence as follows:

CHARLES A. CHANDLER, being recalled, on behalf of the Defendant, testified as follows:

Examined by Mr. ORR:

532 Q. You were sworn as a witness for the plaintiff in this case were you?

A. Yes sir.

84 533 Q. Your attention was called to a blue print marked Exhibit "3"

A. Yes sir.

534 Q. This blue print was made by you was it? (Handing witness Ex. "3.")

A. Yes sir.

535 Q. And the lines run and the survey made by yourself?

A. Yes sir.

536 Q. How much track would it be necessary to construct to connect the track already there with the elevator of the Manley Cooperative Grain Association for elevator purposes?

A. *They* would have to be an extension of 250 feet.

537 Q. Where would that bring it?

A. That would bring it to a point about 80 feet south of the elevator.

538 Q. The track would have to extend beyond the elevator some distance?

A. For them to do business conveniently it would.

539 Q. Is there a switch engine maintained by the Missouri Pacific at Manley?

A. No sir.

540 Q. How is the switching done there?

A. That is done by the regular freight crews.

541 Q. How long have you been in the service of the Missouri Pacific Railway?

A. I have been here about 20 years, 21.

542 Q. You acquainted with the lines of railroad operated by the Missouri Pacific?

A. Yes sir.

543 Q. If a shipment was made from Manley, Nebraska, to At-

chison, Kansas, into and through what states would such shipment be moved?

A. Through Nebraska and Kansas.

544 Q. If a shipment originated at Manley and was destined to Kansas City or St. Louis, Missouri, into and through what
85 states would such shipment be moved?

A. Kansas, Nebraska and Missouri.

545 Q. Do you know whether the defendant, Missouri Pacific, is an interstate railway?

A. Yes sir, it is.

546 Q. Engaged in interstate traffic?

A. Yes sir.

547 Q. I believe you stated your business was that of civil engineer?

A. Yes sir.

548 Q. Is it a part of your business to make estimates of the cost of *const-ucting* switches and building the same?

A. Yes sir.

549 Q. Have you ever made an estimate of the cost of the construction of the switch necessary to be built in order to connect the present switch track of the Missouri Pacific with the Manley Cooperative Grain Association's elevator as located on that map?

A. I have.

550 Q. You may state what that would amount to.

Mr. ROOT: The plaintiff objects as incompetent, irrelevant and immaterial.

The COURT: Overruled.

Exception.

A. That amounts to about $450.00.

551 Q. That is what it would be fairly worth?

Mr. ROOT: The plaintiff objects as incompetent, irrelevant and immaterial.

The COURT: Overruled.

Exception.

A. Do the grading, furnish the material and laying the track.

Cross-examination.

By Mr. ROOT:

86 552 Q. How much of that expense is made up of grading?

A. There would be required in that 575 yards of *gar*ding.

553 Q. What do you estimate that would cost?

A. Thirty cents.

554 Q. A yard?

A. Yes sir.

555 Q. How much would the material cost, ties, rails and spikes?

A. Yes sir. Labor grading.

556 Q. How many feet does that cover?

A. That includes an extension of 250 feet of the present spur,

and then we would have to throw the present spur west a short distance.

557 Q. To make a proper turn?

A. Yes.

558 Q. How much would the material cost?

A. The material will cost $175.00.

559 Q. And the grading?

A. $172.00.

560 Q. And the labor independent of the grading?

A. The labor of laying it would be $37.00.

561 Q. And that includes the moving of the old track some distance to the west?

A. Yes sir.

562 Q. When you speak of a spur that has reference to a side-track joined only at one end?

A. Yes.

563 Q. And if this extension should be made it would lengthen the present spur how much?

A. 250 feet.

564 Q. In shipping a carload of grain from Manley to Omaha into and through what states would the shipment pass?

A. Nebraska only.

87 565 Q. You say that the Missouri Pacific is engaged in interstate traffic, it is also engaged in intrastate traffic, that is, traffic originating and ending entirely in one state through which it runs?

A. Yes sir.

Witness excused.

J. A. KEEDY, being produced and duly sworn, on behalf of the Defendant, testified as follows:

Examined by Mr. ORR:

566 Q. What is your name?

A. J. A. Keedy.

567 Q. Where do you reside?

A. Manley, Nebraska.

568 Q. What is your occupation?

A. Railroad agent and operator.

569 Q. In the service of the Missouri Pacific?

A. Yes sir.

570 Q. How long have you been so employed at Manley?

A. 11 years at Manley.

571 Q. Are you acquainted with Mr. Andrus?

A. Yes sir.

572 Q. Are you acquainted with the concern known as the Manley Cooperative Grain Association?

A. Yes sir.

573 Q. How many elevators are there doing business at Manley?

A. Three.

574 Q. When did the last one start up?

A. The last company was organized sometime in December, 1904, and I think shipped about their first car of grain in January, 1905; they commenced building their elevator near the first of January this year, and completed it sometime in February.

88 575 Q. Have you heard the testimony of Mr. Andrus here?

A. Yes sir.

576 Q. Do you know the amount of business, that is elevator business, transacted at Manley during the years 1903, '4, '5 and '6?

A. My yearly statements for those years show a business of about 350 carloads, the average business of the station is 350 cars.

577 Q. Prior to the time when the Manley Cooperative Grain Association started up in business you may state whether or not the elevators there could handle the business and did handle the business.

Mr. ROOT: The plaintiff objects as calling for a conclusion of the witness, incompetent and leading.

The COURT: Overruled.

Exception.

A. There was no time since I have been there, the 11 years, when the elevators there now have been taxed to their full capacity, except one day when teams had to wait to get the grain elevated; that was when they had horse power.

578 Q. How about the elevators that were there originally handling the business?

Mr. ROOT: The plaintiff objects as calling for a conclusion of the witness, incompetent and leading.

The COURT: Overruled.

Exception.

A. They could handle the business.

579 Q. Could they do that to-day?

A. Yes sir, they could handle a car an hour.

580 Q. Who operates the two other elevators?

A. Mr. John Tighe operates the one in the north end of the yard, and Mr. Keckler has the middle elevator, and the Manley Cooperative Grain Association has -he south elevator.

89 581 Q. If there were but the two elevators, the one operated by M. Tighe and the one operated by Mr. Keckler, doing business at Manley, at this time, during the year 1906, could they handle the business that is brought there for elevation?

A. Yes sir.

582 Q. Could they do that in the year 1905?

A. Yes sir.

583 Q. So far as the necessity for additional facilities is concerned was another elevator there necessary?

Mr. RAWLS: The plaintiff objects as calling for a conclusion, and incompetent.

The COURT: Sustained.

Exception.

584 Q. Was there any necessity for a third elevator at Manley to

take care of the elevator business that came to that point during the year 1905?

Mr. RAWLS: The plaintiff objects as calling for a conclusion, and incompetent.

The COURT: Overruled.

Exception.

A. There was no necessity of a third building in order to handle the business, because the two could handle all the grain offered.

585 Q. Mr. Andrus testified to some annoyances about freight cars, I will ask you to state what the rule was there and is there at Manley relative to furnishing cars for grain shipments?

A. Well the rule is, first, for me to satisfy myself that in accepting their orders that they have got the grain in sight, and the next thing was that in case of a scarcity of cars, that the cars be distributed in the order in which they were requested.

586 Q. What do they do to request cars?

A. We have an order book there which I require them to place their orders upon. In furnishing cars we are also instructed to take into consideration their capacity for handling cars.

90 587 Q. Did you, in disposing of cars and in the distribution of cars, or in your treatment of these different elevator concerns, did you make any preference in giving them cars?

A. No sir.

588 Q. Did it ever occur to you that any of the other elevators were out of cars?

A. Yes sir; there is a like condition to-day.

589 Q. Did you ever measure or take any notice of the elevator owned by the Manley Cooperative Grain Association to ascertain the number of bins and the capacity of the elevator?

A. Yes sir.

590 Q. You may state what investigation you made in that respect.

A. In the first place I measured the outside, took the outside measurements of the building, which I found to be 24 by 26, with a ten foot driveway, 28 foot posts, two ten foot lean-t-s; the outside of the elevator is laid off by 3 8 foot bins, the second bin is a hopper bin below the building 4 foot, this 3 bin is hoppered 4 foot above the sill.

591 Q. By the "sill," what do you mean by that?

A. Of the wall of the foundation, above that.

592 Q. In other words the hopper doesn't extend into the basement?

A. Not of the east bins. On the south side it is laid off in three 8 foot bins, 8 foot square, and they are hoppered in the same way with a four foot hopper; at the top in the center of the elevator, after coming from the south side the center of that is raised 8 foot, and placing these bins in that shape (witness indicating) making the bins in this shape (witness indicating). Between these 8 foot bins there is a ten foot work-room, the floor of which is raised 4 foot above the foundation. The work room is ten foot high, there is a joist

above that and above that is a floor, and there is two bins above that.

593 Q. How many bins altogether?

91 A. 13 bins without the dump, and that arrangement underneath the floor.

594 Q. Did you measure and calculate the capacity of those bins?

A. I didn't measure the bins. I obtained the size of the bins from a man working on the building; there is 3 bins over the driveway, the floor of the driveway is raised 4 feet above the sills of the main building. The driveway is ten foot high and ten foot wide.

Cross-examination.

By Mr. RAWLS:

595 Q. You say you merely took the outside measurements?

A. The outside of the building.

596 Q. And this other matter you have been testifying to is something you didn't learn from your own measurements?

A. From a man working there.

597 Q. What somebody else told you?

A. Yes sir.

Mr. ROOT: The plaintiff moves to strike out all testimony of this witness as to the dimensions and size of the bins for the reason that it — hearsay and incompetent.

The COURT: Sustained.

Exception.

598 Q. Now Mr. Keedy you say that the two elevators there are amply sufficient to accommodate the traffic?

A. Yes sir.

599 Q. Do you want the Court to understand you as testifying they will care for all the grain that is offered at any time at Manley?

A. They have been able to take it, except one day when they had horse power.

600 Q. You mean when they have cars?

A. Yes sir.

601 Q. At times there is a shortage of cars-

A. Yes sir.

92 602 Q. Then the elevators fill up with grain?

A. Yes sir.

603 Q. During that time they neither receive nor ship grain?

A. Yes sir.

604 Q. You say that is the condition at the present time?

A. There are no cars now.

605 Q. The elevators are filled with grain at some times, and they are forced to stop buying grain when they can get no cars?

A. They have to stop buying grain at times.

606 Q. During those times two elevators would not be sufficient?

A. If they couldn't ship it out no.

607 Q. If the cars are furnished then the two elevators are sufficient to handle all the grain offered there on any one day or set of days?

A. Yes sir.

608 Q. You say your rule is that the cars are to be furnished in the order in which they are requested?

A. That is the rule as I understand it.

609 Q. Did the legal department of the Missouri Pacific furnish you advice to that effect?

A. I read the law myself.

610 Q. If Mr. Tighe and Mr. Keckler should leave an order there for 10,000 cars apiece they would get them before the Manley Co-operative Grain Association would get any?

A. No sir.

611 Q. Why?

A. Because I would know they didn't have that much grain.

612 Q. If Mr. Tighe and Mr. Keckler should put in an order for 50 cars apiece, and could satisfy you that they had the grain in sight, would these men get the cars before the Manley Cooperative Grain Association could get a car if they had order- it afterwards?

93 A. Yes sir, if cars were scarce.

613 Q. You know Mr. Keedy don't you that it is the policy of your employer, the Missouri Pacific, to discourage these additional elevators, and especially the farmer's elevators?

Mr. ORR: The defendant objects as not proper cross examination.
The COURT: Overruled.
Exception.

A. I don't know anything about that.

614 Q. Did you ever receive any specific instructions as to how the Manley Cooperative Grain Association should be treated?

A. Yes sir.

615 Q. Where did you get the instructions?

A. From Mr. Russell.

616 Q. When?

A. When they first started business, and two or three times afterwards.

617 Q. Have you those instruction- with you?

A. No sir.

618 Q. There was considerable friction between the elevator men themselves, and some between you and the Manley Cooperation Association people?

Mr. ORR: The defendant objects as not proper cross examination.
The COURT: Overruled.
Exception.

A. Some little, yes sir.

619 Q. And you understood the railroad company had leased practically all of this right-of-way to these other grain men?

Mr. OFF: The defendant objects as not proper cross examination.
The COURT: Sustained. Exception.

620 Q. How much of the right-of-way is leased to the elevator men? I show you Exhibit "3," being a plat of the right-of-
94 way of the Missouri Pacific at Manley. The depot is on the east side of the main track there. That's right isn't it?

A. On the west side.
621 Q. And the east side of the spur?
A. Yes sir.
622 Q. North of the depot there is one elevator?
A. Yes sir.
623 Q. And what other building?
A. Coal building.
624 Q. Whose coal shed is that?
A. John Tighe's.
625 Q. South of Mr. Tighe's elevator and south of the depot still there is another structure, what is that?
A. That's a coal house.
626 Q. Whose coal house is that?
A. Mr. Keckler's.
627 Q. He has the elevator south of the stock yards?
A. Yes sir.
628 Q. Somewhere south of Keckler's elevator is Keckler's corn crib?
A. Yes sir.
629 Q. How much of this right-of-way is leased to Mr. Tighe?
A. It comes about midway from the elevator and the depot, from the crossing. Mr. Keckler starts at a distance 65 feet from the end of the spur here, extends up to the stock yards and up around to that gate into the stock yards.
630 Q. He also has some leased there at his coal house?
A. Yes.
631 Q. How much space is there between the north end of the track to the right-of-way west of the spur track that is rented
95 to Mr. Keckler, and the south line of that right-of-way leased to Mr. Tighe?
A. Well he has this (indicating) space except where the coal house stands. This space here (indicating) is all vacant here up to within about 60 feet of Tighe's elevator.
632 Q. What point on the spur track do these Manley Cooperative Grain Association people load their cars?
A. Principally on the end of this spur (indicating).
633 Q. In order to get to that it is necessary to drive over part of the land leased to Keckler?
A. If they want to load more than one or two cars they have to, on the east side it is clear there.
634 Q. When they were loading they had a controversy with Keckler, and Keckler tried to keep them away from the cars because he said they were going over his leased land?

Mr. ORR: The defendant objects as not proper cross examination.
The COURT: Overruled.
Exception.

A. I don't know anything about that.
635 Q. In placing the cars for them to load you don't always put them down at the end of the spur track?
A. We do now.

636 Q. In the early part of their existence you did not?

A. No because we set it wherever they could get to it with a wagon.

637 Q. I understood you to testify about this:—that if these three elevator men all had grain to ship, and Keckler and Tighe should order a large number of cars on the same day the Cooperative people did, but before they did, and there was a scarcity of cars, you would fill the first orders before you would give the last man anything?

96 A. Yes sir.

638 Q. In that arrangement did it ever happen you furnished the Cooperative people cars and compelled Tighe and Keckler to wai*d*t for cars?

A. I have furnish- cars out of order for them, yes sir.

639 Q. How often?

A. Two or three times when I could arrange and satisfy everyone concerned; I have three men down there all fighting me and I have to try and satisfy them if I can.

Redirect examination.

By Mr. ORR:

640 Q. By the same rule, if the Manley Cooperative Grain Association had their order in first the cars would be furnished to them before the others?

A. Yes sir.

641 Q. There was no discrimination between the elevators in that respect?

A. No sir, just as they appear on the book, when there are cars.

642 Q. As a rule they all can't get all they want?

A. If they are plentiful they can't get all they want.

643 Q. You were asked whether if there was no cars, whether the two elevators could take care of the grain offered. If there was no cars brought to that station the three elevators would take care of the grain offered, nor ten of them?

A. No sir.

644 Q. The amount of grain is about 350 cars shipped from there?

A. Yes sir.

Recross-examination.

By Mr. ROOT:

97 645 Q. You undertake to testify that on every occasion when the cooperative people had their order in first, you always furnished them cars before you furnished Tighe and Keckler a car?

A. Yes sir; my books will show that.

646 Q. You testify that you did that?

A. I testify I aimed to give them just as square a deal as the other men.

647 Q. That's always been the case?

A. Yes sir.

Witness excused.

Here the defendant rests.

And the plaintiff, to maintain the issues on its behalf to be maintained, adduced evidence as follows:

C. M. ANDRUS, being recalled, on behalf of plaintiff, testified as follows:

Examined by Mr. RAWLS:

648 Q. Did you hear Mr. Keedy's testimony to the effect that you had always been supplied with cars before the others when you ordered first, before the other two elevator men?

A. Yes sir.

649 Q. You may state to the Court if at any time you ordered cars prior to the order of the other two elevators, and did not get them first?

Mr. ORR: The defendant objects as not proper rebuttal, and having been gone over in direct examination.

The COURT: Overruled.

Exception.

A. I can call one occasion when it happened that way, when I ordered two cars and there was three cars came in and he gave two of the cars to the other elevator, claiming there was a scarcity
98 of cars and he had to divide the cars, and I had ordered first.

Witness excused.

Both the plaintiff and defendant rest.

Testimony closed.

EXHIBIT ONE (1).

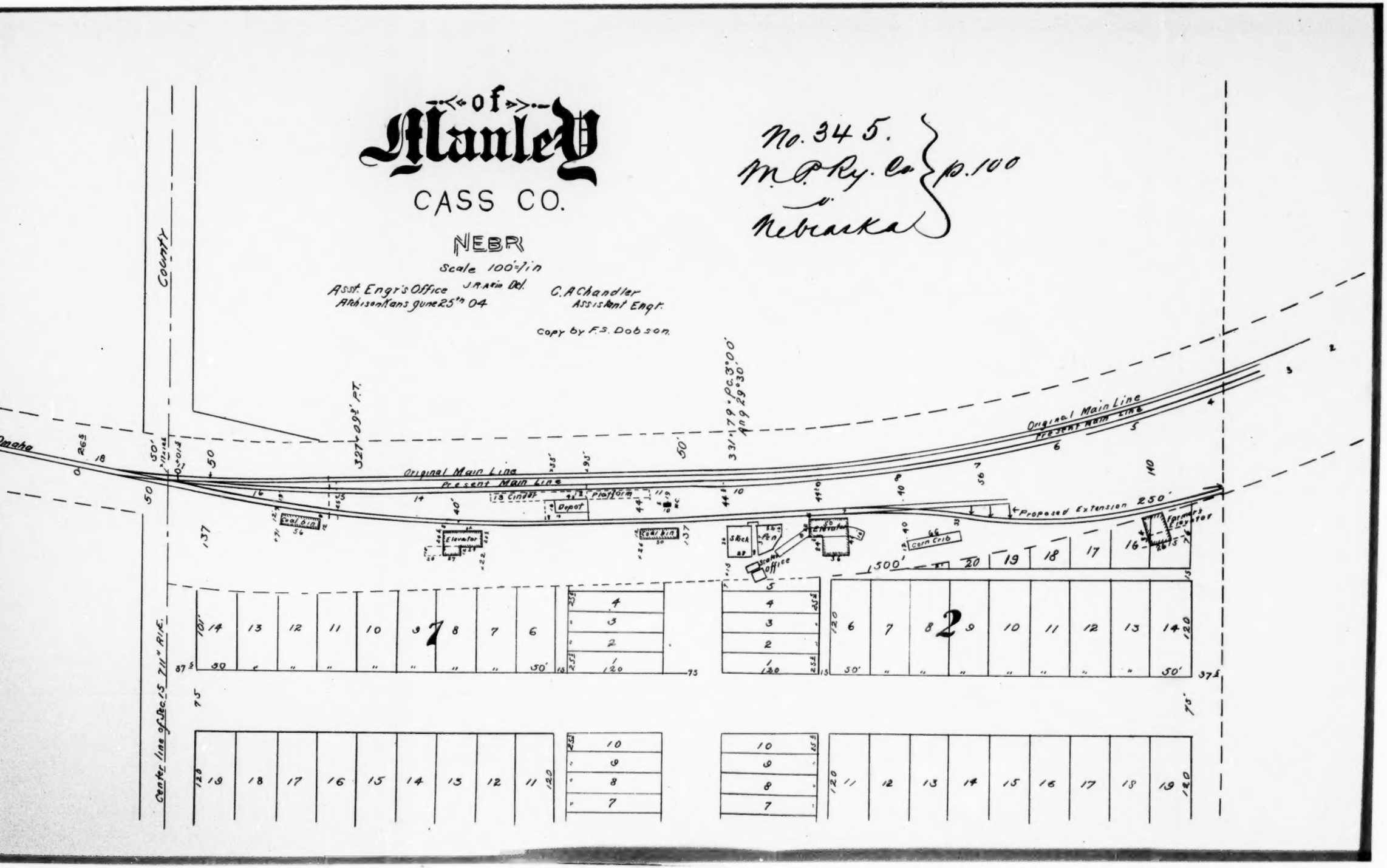
(Here follows map marked p. 98.)

99 (Offer of Exhibit "2" withdrawn.)
(See page 10 hereof.)

100 EXHIBIT THREE (3).

(Here follows map marked p. 100.)

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101 COPY OF EXHIBIT "4."

The Manley Co-operative Grain Association.

C. M. Andrus, Mgr.

MANLEY, NEBR., *Oct.* 23*d*, 1905.

To the officers of the Missouri Pacific Railroad Co.

GENTLEMEN: The members of this association hereby make application for a lease to ground on the right of way of the Missouri Pacific R. R. in Manley, Nebr., the ground to be used as a building site for a grain elevator. An early reply will be appreciated.

THE MANLEY CO-OPERATIVE GRAIN ASSOCIATION,
By J. B. CLEGHORN, *Secretary.*

Manley, Nebr.

102 COPY OF EXHIBIT "5."

The Missouri Pacific Railway Company, St. Louis, Iron Mountain & Southern Ry. Co., and Leased, Operated, and Independent Lines.

Manley: Location for elevator. E10313.

ATCHISON, *Oct.* 28, 1905.

The Manley Co-operative Grain Ass'n, Manley, Neb.

GENTLEMEN: In reply to your favor of the 23rd inst. beg to advise that we already have a sufficient number of elevators located on our right-of-way at Manley to take care of all the business originating at that station and we can not therefore grant your application.

Yours truly, J. RUSSELL,
Superintendent.

103 COPY OF EXHIBIT "6."

NOV. 8TH, 1905.

The Missouri Pacific Railway Company, Atchison, Kan.

GENTLEMEN: The Manley Co-operative Grain Association of Manley on the 23rd day of Oct., 1905 requested in writing that you furnish a site for them to construct a grain elevator on you- right of way in Manley, Nebraska, to be used for the handling and shipping of grain at that point. Your Superintendent on the 28th day of Oct., answered that as there were sufficient elevators at Manley to accommodate the business originating at that point you refused their request.

Now, this Ass'n has the control of a tract of land adjacent to your right of way and near the south end of your side track

as now located. It is the purpose of the Ass'n to construct an elevator on this land; that the elevator shall have at least 15000 bushels capacity, and when constructed, or nearing construction, you will be expected to comply with the laws of Nebraska and under Ch. 105 of the Session Laws of 1905 extend your side track so that grain can be loaded from said elevator into cars on such extended side track. This Association is made up of representative and substantial farmers resident in and about Manley; they have shipped the past year nearly 50000 bushels of grain over your road loading into cars on the side track. The members of the Association have ample capital to construct and operate an elevator and want to do business with your company. There is ample room on your right of way adjacent to your side track whereon if permitted they could construct their elevator and thereby obviate
104 the necessity of building on their own land and causing the expense of extending the sidetrack. They do not know what such expense might be; The Ass'n is willing to negotiate with you and bear any equitable share of the expense of extending the siding if you will either construct the same forthwith or contract to do so when it may be needed. In short, the Ass'n is willing to treat you fairly and honorably; it does not desire litigation, unless forced thereto to secure its rights. However, if litigation is its only recourse it will reluctantly engage therein. Will you consider any proposition looking toward the extension of your switch further south at Manley as above indicated? The Ass'n will give bond to construct the elevator contemplated by law. A failure to answer this communication within six days will be taken as a refusal to consider any of the propositions or suggestions herein contained.

Yours truly,

—— ——.

105 COPY OF EXHIBIT "7."

The Missouri Pacific Railway Company, St. Louis, Iron Mountain & Southern Ry. Co., and Leased, Operated, and Independent Lines.

Manley: Location for elevator. A-21652.

ATCHISON, KANS., *Nov. 22nd*, 1905.

Mr. J. B. Cleghorn, Secretary Manley Co-operative Ass'n, Manley, Neb.

DEAR SIR: With the acknowledgment of the receipt of your favor of Nov. 8th, I beg to say, that so far as I am aware, there is no change in our position. We will not lease you a portion of our ground, upon which to erect an elevator, nor will we give you trackage privilege, to load from such a structure, if erected on your individual property.

Yours Truly,

J. RUSSELL,
Superintendent.

JR-N.

106 COPY OF EXHIBIT "8."

The Missouri Pacific Railway Company, St. Louis, Iron Mountain & Southern Ry. Co., and Leased, Operated, and Independent Lines.

Manley: Location for elevator. A-21305.

ATCHISON, *Nov. 12th*, 1905.

Manley Co-operative Grain Ass'n, Manley, Neb.

GENTLEMEN: Beg to acknowledge receipt of your letter of 8th inst. in regard to location for elevator at Manley, and to advise you, that Mr. Russell is at present out on line, and that reply to your communication will be necessarily delay- until his return.

I can promise you, however, that you will receive reply thereto, at the earliest possible date.

Yours truly,

J. RUSSELL,
Superintendent.

107 COPY OF EXHIBIT "9."

MANLEY, NEB., *Jan'y* 12, 1906.

The Missouri Pacific Railway Company.

GENTLEMEN: The Manley Co-operative Grain Association has now about completed the construction of an elevator adjacent to your right of way in Manley, Cass County, Nebraska. Said elevator is of greater capacity than fifteen thousand bushels, and will be ready in about ten days for use in the storing, elevating and shipping of grain. We have about 100,000 bushels of corn in sight for that elevator; The elevator is so situated that your present side-tracks can be extended in nearly a straight line and if built in that direction and within four feet of the edge of the right of way will permit the switching of cars to be loaded for shipment. As we wrote you some time since we have shipped about 50,000 bushels of corn in the past season from your station at Manley and have been compelled to load it into cars on the side track. Our elevator will permit the more economical and speedy handling of grain. We expect to continue in business for an indefinite time at Manley, and trust we may ship many thousands of bushels of grain over your road to our mutual profit and the benefit of the farming community. We still remain willing to bear an equitable share of the expense of extending said siding. We now again demand the extension of your side track to said elevator, so constructing it that the tracks will be laid within four feet of the outer line of your right of way. Your refusals have been positive heretofore, but we trust you may soften your hearts and obey the laws of the State of Nebraska. Should you commence the extension of said track immediately we will have grain in the elevator and ready for shipment as soon as the trackage is in position.

Sincerely Yours,

—— ——.

108 COPY OF EXHIBIT "10."

FEBR. 2D, '6.

The Missouri Pacific Railway Co., A. W. Sullivan, General Manager, St. Louis, Mo.

DEAR SIR: This association has been doing business about one year, have loaded and shipped about fifty thousand bushels of grain over your road through a scoop house, we expect to ship twice that amount this season. In October we asked for an elevator site on the right of way and were turned down by the officers of this division, and have erected a house of the capacity required by law on ground adjoining the right of way and have been refused trackage. We have offered to bear a reasonable amount of the expense incurred in providing the amount of trackage necessary which will only be the extension of the present side track a few rail lengths further down the line. We are constrained to ask you—should they still refuse to comply with our request if there is any way we can get what is our right in this matter without going into Court.

Thanking you for past favors extended, we are,

Respectfully,

THE MANLEY CO-OPERATIVE GRAIN ASSOCIATION,
By J. B. CLEGHORN, *Sec'y.*

(NOTE.—Ex. "11" not offered, being a copy of Ex. "14.")

109 COPY OF EXHIBIT "12."

In the District Court of Cass County, Nebraska.

THE STATE OF NEBRASKA, Pl'ff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Def't.

To the defendant The Missouri Pacific Railway Company, and its Attorneys of record:

You are hereby notified that the plaintiff, The State of Nebraska, hereby demands that you produce and have at the trial of the case of The State of Nebraska against The Missouri Pacific Railway Company, in the District Court of Cass County, Nebraska, set for hearing during the week commencing October 22nd, 1906, and expected to be reached about the 24th day of October, A. D., 1906, the following described papers and documents now in your possession and under your control, to-wit:

A certain Notice and request in writing by the Manley Co-operative Grain Association for a lease of a portion of your right-of-way at Manley, Cass County, Nebraska, sufficient in extend for a building site for a grain elevator, which notice and request is dated October 23rd, 1905, at Manley, Nebraska.

Also a notice and request to you by the said Manley Co-operative

Grain Association of Manley, Nebraska, that you extend your side track at the Station of Manley, Cass County, Nebraska, southward to a point adjacent thereto where said Grain Association proposed to erect an elevator on land adjacent to your right-of-way, and controlled by the said Grain Company, said notice and request being dated November 8th, 1905; also a demand made by The Manley Co-operative Grain Association upon you for the extention of your side
110 track running southward at your station at Manley, Cass County, Nebraska, to the elevator of said Grain Association located adjacent to your right of way at said station, on ground outside of but adjacent to your right of way, controlled by said Grain Association, said demand being dated at Manley, Nebraska, on the 12th day of January, A. D., 1906. Also a request by said Grain Association for an extension by you of your right of way at Manley, Nebraska, to the elevator of said Grain Association which is located adjacent *of* your right of way on ground controlled by said Grain Association, said notice and request is dated February 2, A. D., 1906. And also a request and demand for the extension of your side track at Manley, Cass County, Nebraska, to the grain elevator of The Manley Co-operative Grain Association located on ground controlled by it adjacent to your right of way at said place, said request being dated Manley, Neb., Feb. 9th, 1906.

If you fail to comply with the above demand, plaintiff will offer secondary evidence to prove said documents and their contents.

Dated this 11 day of October, A. D. 1906.

C. A. RAWLS,
Attorney for Plaintiff.

Endorsed on back: Oct. 11th, 1906, Copy of this notice rec'd this day. A. N. Sullivan, Local Attorney.

111 COPY OF EXHIBIT THIRTEEN (13).

In the District Court of Cass County, Nebraska.

THE STATE OF NEBRASKA, Pl'ff,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Def't.

The defendant in the above entitled cause, The Missouri Pacific Railway Company is hereby demanded by the plaintiff to produce at the trial of the above entitled cause on the 23rd day of October, A. D. 1906, in the District Court of Cass County, Nebraska, the following described documents, to-wit:

The contract and agreement of defendant with the two elevators on right of way at Manley, Neb. showing the terms and conditions upon which the two elevators located on the right of way of defendant at Manley, Cass County, Nebraska, occupy such right of way, and operate their said elevators.

THE STATE OF NEBRASKA,
By its Att'y, C. A. RAWLS.

Oct. 17th, 1906. Rec'd copy of this notice.

A. N. SULLIVAN,
Local Attorney.

112 COPY OF EXHIBIT "14."

MANLEY, NEB., *Feb.* 9, 1906.

The Missouri Pacific Railway Company.

GENTLEMEN: The Manley Co-operative Grain Association has now completed and is occupying a grain elevator of more than fifteen thousand bushels capacity, which said elevator is constructed on and adjacent to your right of way in Manley, Cass County, Nebr. We have grain in this building and desire to ship it over your road, and desire you to extend your side track so as that we may convey the grain from the elevator into cars on the siding. If the present tracks are extending their present direction and within four feet of the exterior of you- right of way it will accommodate us. We only ask of you the same facilities as you extend to other shippers and owners of elevators on your road. You have heretofore refused us those facilities, but we trust now that we are equipped ready for business you will reconsider your former position and give us a side track or rather the use of one. Kindly advise us at once your intentions in the premises.

Sincerely yours,

THE MANLEY CO-OPERATIVE GRAIN ASSOCIATION,
By J. B. CLEGHORN, *Secretary.*

113 In the District Court of Cass County, Second Judicial District of Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
vs.
THE MISSOURI PACIFI- RAILWAY COMPANY, Defendant.

Defendant's Bill of Exceptions.

And the defendant in the above entitled cause in the District Court of Cass County, in the Second Judicial District of Nebraska, having within the time heretofore allowed by the Court for that purpose, reduced to writing in this its bill of exceptions all of the evidence adduced or offered on both sides on the trial of the above entitled cause in the before named court, all of the objections, with the grounds therefor, made to the admission of the evidence, all of the rulings of the Court on such objections, and all of the exceptions to such rulings made and taken at the time, and having served the same on the attorney for the *pa*intiff, according to law, for examination and amendment, and the same being here now before me, the undersigned Judge, before whom the said cause was heard, on the motion of the attorney for the defendant, that the same may be settled, allowed, sealed, and made a part of the record of said cause in said court.

Now, I, the said Judge, do hereby certify that this the defendant's

bill of exceptions, contains all of the evidence adduced or offered by plaintiff and defendant on the trial of said cause, all of the objections made to the admission of the evidence, all of the rulings of the Court on such objections, and all of the exceptions to such rulings made and taken at the time.

Wherefore, I, the said Judge, do hereby settle, allow, and sign this the defendant's bill of exceptions, and do hereby order that it be made a part of the record of said Cause in said court.

114 Done at Plattsmouth, Nebraska, this 14th day of March, 1907.

PAUL JESSEN,
Judge of the District Court.

I, James Robertson, Clerk of the District Court, of Cass County, in the Second Judicial District of Nebraska, do hereby certify that this is the original bill of exceptions filed in the office of the Clerk of said Court in the case of The State of Nebraska, plaintiff, against The Missouri Pacific Railway Co., defendant.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Court this 15 day of March, 1907.

[SEAL.] JAMES ROBERTSON,
Clerk District Court.

I, John S. Taggart, Reporter, do hereby certify that this Transcript contains all of the evidence offered on both sides on the trial of the above entitled cause in the above named Court.

JOHN S. TAGGART, *Reporter.*

Case No. —. Filed in District Court, Cass County, Neb. Mar. 15, 1907. James Robertson, Clerk.

Endorsed on back as follows: 15122. State of Nebraska *v.* The Missouri Pacific Railway Company. Bill of Exceptions Supreme Court of Nebraska Filed Mar. 21, 1907 H. C. Lindsay, Clerk.

115 And afterwards, to-wit, on the 18th day of February 1908, the following among other proceedings were had and done in said Supreme Court, to-wit:

The following cases were argued and submitted to the Court and Department No. 1.

* * * * * * *

15122.

STATE
v.
MISSOURI P. RY. CO.

Appeal from Cass County.

* * * * * * *

And afterwards on the 5th day of March, 1908, there was rendered by said Court and enter-d of record upon the Journal thereof a certain Judgment in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1908.

MAR. 5.

No. 15122.

STATE OF NEBRASKA, Appellee,
v.
MISSOURI P. RY. CO., Appellant.

Appeal from the District Court of Cass County.

This cause coming on to be heard upon appeal from the district court of Cass County, was argued by counsel and submitted to the Court; upon due consideration whereof, the Court doth find no error apparent in the record of the proceedings and judgment of the said district court, it is therefore considered, ordered and adjudged that the said judgment of the district court be, and the same hereby is affirmed; that appellee pay all costs incurred herein by it, taxed at $——, and have and recover of and from the appellant all its costs so expended herein; that appellant pay all its costs incurred herein by it, taxed at $——, for all of which execution is hereby awarded, and that a mandate issue accordingly.

116 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Syllabus and Opinion by said Court, pursuant to which the preceding judgment was entered, which Syllabus and Opinion are in the words and figures following, to-wit:

117 No. 15122.

STATE
v.
MISSOURI PACIFIC RAILWAY CO.

Commissioner's Opinion.

Opinion Filed March 5, 1908.

Department No. 1.

1. While interstate commerce and the instrumentalities by which it is carried on *is* within the exclusive control of the Federal Congress, the domestic commerce of a state and the facilities by which it is conducted *is* within the control of the State, and the legislature of the state may make such reasonable rules and regulations governing its domestic commerce and the instrumentalities by which it is conducted as seems best fitted to advance the interest and convenience of its citizens, provided such regulation does not directly burden or interfere with the interstate commerce of the nation.

2. Produce does not become a matter of interstate commerce until delivered to the carrier to be transported out of the state to the state of its destination, or has started on its ultimate transportation to that state.
3. Sec. 1 of Chap. 105, laws of 1905, is not subject to the objection of being special or class legislation.
4. The law referred to in the last preceding paragraph of this syllabus is not objectionable as allowing the taking or damaging of private property without just compensation or as depriving the citizen of his property without due process of law.

118 DUFFIE, *C.*:

The Legislature of 1905 passed an act which contains, among others, the following provisions:

SEC. 1. "Every railroad corporation shall give to all persons and associations reasonable and equal terms for the transportation of any merchandise or other property of every kind and description, upon any railroad owned or operated by such corporation within this state, and for terminal handling the use of the depot and other buildings and grounds of such corporation, and at any point where its railroad shall connect with any other railroad, reasonable and equal terms and facilities of interchange and shall promptly forward merchandise consigned or directed to be sent over another road connecting with its road, according to the directions therein or accompanying the same; and every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip, and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of
119 their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels."

SEC. 6. "Any railroad company, officer or agent thereof who willfully violates or evades any of the provisions of this Act, shall be liable to the party injured for all damages sustained by reason of such violation, and in addition thereto, shall be liable for each of-

fense to a penalty of five hundred dollars ($500), which may be recovered by the county attorney in an action brought in the name of the state of Nebraska in any county by an action in the District Court where such railroad company or corporation is doing business."

This act is known as Chapter 105 of the Session Laws of 1905.

The facts leading up to this legislation are so well known that judicial notice thereof may be taken. Whether well founded or not, the public at large had come to believe that a combination existed between the grain dealers and owners of elevators within this state to control the price of grain, and as a result, that the producer was compelled to sell at a price much below the market value of
120 his product. In this condition of affairs, the Legislature enacted the statute above set out and many of the farmers throughout the state organized companies for the purpose of erecting and maintaining elevators at the railway stations most convenient to their homes.

In 1905, The Manley Cooperative Grain Association was organized and in October, of that year, applied to the Manager of the Missouri Pacific Railway Company, for a lease to grounds on the right of way of the Missouri Pacific in Manley, Nebraska, the ground to be used as a building site for a grain elevator. On October 28th, defendant's superintendent replied to this application as follows:

"In reply to your favor of 23rd inst., beg to advise that we already have a sufficient number of elevators located on our right of way at Manley to take care of all the business originating at that station and we cannot, therefore, grant your application."

On November 8, 1905, the Association again wrote the officers of the Company stating that it had control of a tract of land adjacent to the railroad right of way and near the south end of a side track on the road. It was further stated that the Association proposed to construct an elevator on this land, having a capacity of at least fifteen thousand bushels and when constructed it would expect the Company to comply with the laws of Nebraska and to extend its side track so that grain could be loaded from the elevator into cars on such extended side track. The letter further stated that the
121 Association was made up of representative and substantial farmers residing in and about Manley who, during the last year had shipped about fifty thousand bushels of grain over defendant company's road; that the members of the Association had ample capital to construct and operate the elevator and wished to do business with defendant company; that there was ample room on the right of way adjacent to defendant's side track where, if permitted, they would construct their elevator and obviate the necessity of building on their own land and causing the expense of extending the sidetrack; that while they did not know what such expense might be, they were willing to bear an equitable share of the cost if the defendant company would either construct the same forthwith, or contract to do so when it was needed. The letter concluded with an inquiry whether the Company would consider any proposition looking toward the extension of its switch further south as above indicated and offering to give a bond to construct the elevator.

In reply, the Superintendent of the Company, under date of November 22nd, stated that there was no change in the position of the Company. His letter concluded as follows:

"We will not lease you a portion of our ground upon which to erect an elevator nor will we give you trackage privilege to load from such a structure if erected on your individual property."

On January 12, 1906, the Grain Association notified the Company, in writing, that it had about completed the construc-
122 tion of its elevator which had a capacity of more than fifteen thousand bushels; that they had about one hundred thousand bushels of corn in sight for the elevator; that the building was so situated that the present side track could be extended in nearly a straight line and if built in that direction and within four feet of the edge of the right of way would permit the switching of cars to be loaded for shipment. It was further stated that during the last season, the Association had shipped about fifty thousand bushels of corn from the station at Manley and had been compelled to load it into cars on the side track; that their elevator would permit the more economical and speedy handling of the grain; that they expected to continue in business at Manley for an indefinite time; that they were still willing to bear an equitable share of the expense in extending the siding and now again demanded the extension of the side track to the elevator so that the side track would be laid within four feet of the outer line of the company's right of way.

The defendant Company still refused to comply with the demand of the Grain Association to extend its track.

Thereafter this action was brought in the District Court of Cass County, to recover the penalty of five hundred dollars provided by statute for such refusal. On the trial, judgment went in favor of the State and defendant has appealed to this Court.

The defenses urged against the maintenance of the action are, briefly stated, the following:

123 First. That the subject matter of the action is within the exclusive jurisdiction of the United States and subject only to the control of Congress and, Congress having acted in the passage of the Act to regulate commerce, approved June 30, 1906, the State Court is deprived of all jurisdiction of the subject matter of the action, the defendant road being an inter-state road and the claim being that the grain, to be handled in the elevator in question was intended for inter-state shipment.

Second. That the statute under which the action is brought is invalid because it is special and class legislation and repugnant to section fifteen, article three of the Constitution of the State of Nebraska and which prohibits special legislation.

Third. That the statute under which the action is brought provides for taking and damaging the property of appellant without just compensation and is therefore violative of section 21 of article 1 of the Constitution of the State.

Fourth. That the statute under which the action is brought seeks to deprive appellant of its property without due process of law

and is repugnant to the 14th amendment to the constitution of the United States.

While each of the foregoing defenses are insisted on, defendant has chiefly devoted *his* argument to the one first mentioned, insisting that as the road of defendant company is an inter-state road, chartered by the state of Missouri, and having a continuous
124 line extending through five or six or seven states of the Union, its track and appurtenances *is* exclusively under federal control and not subject to state regulation, or the jurisdiction of the state courts. On the oral argument it was conceded by the attorneys representing the defendant that so far as the domestic commerce of the state is concerned, it is subject to state control and regulation and with this concession freely given it is hard to see why the sovereign state which may control its own domestic commerce shall not have a voice in determining the facilities by which that commerce is to be conducted. That purely internal commerce of a state is exclusively under state regulation has been many times determined by the Supreme Court of the United States.

Moore *v.* American Transportation Co., 24 Howard, 1.
Walker *v.* Western Transportation Co., 3 Wallace, 152.
The Daniel Ball 10th Wallace, U. S. 557.

In the case last cited it is said: "The limitation of the power of Congress over commerce to commerce among the several states, with foreign nations, and with the Indian tribes, necessarily excludes from federal control all that commerce which is carried on entirely within the limits of the state, and does not extend to or effect other states."

While defendant concedes that this is the rule, argument of counsel is partially based upon the theory that the grain which this elevator proposes to receive is intended for shipment to markets in other states, and further that the act to regulate commerce,
125 approved June 11, 1906, commonly known as the Hepburn bill, places all interstate railroads, including switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the person or property designated therein, and all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property, and all instrumentalities and facilities of shipment or carriage under charge and control of the interstate commerce commission. So far as the road is engaged in interstate commerce it cannot be denied that every appurtenance of the road is within the control of the Inter-state Commerce Commission, but this does not in the least interfere with state control of the road and its appurtenances so far as it is engaged in intra-state commerce. As said by the Supreme Court of Iowa, in McGuire, *v.* C. B. & Q. R. R. Co., 108 N. W. 902-12: "Subject alone to the condition that the regulation imposed does not operate upon interstate commerce or otherwise violate the provisions of the federal constitution, the power of the state to prescribe the terms on which foreign corporations may do business within its jurisdiction is unlimited. The fact that the corporation is engaged in inter-state

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commerce does not exempt it from control by the state in respect to all business done therein not directly connected with traffic between the states. For instance, the local statutes pertaining to the duty to fence railway tracks, imposing liability for live stock killed by moving trains, or for damages by fire set out by engines, regulating the speed of trains within city or yard limits,
126 abolishing the fellow servant's rule, requiring the redemption of unused tickets, and regulating contracts of employment, are no less applicable to foreign corporations engaged in inter-state commerce than to domestic corporations doing only a local business."

Again, it might be said that the defendant company, by entering this state, subjected itself to all our laws relating to the control and management of railways. Section 121 of Chapter 16 of the Compiled Statutes, 1907, has been in force since 1864. It is as follows: "Every such railroad corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of passengers and freight, and shall take, transport, and discharge all passengers to and from such stations as the trains stop at, from or to all places and stations upon their said road, on the due payment of fare or freight bill."

In State *v.* R. V. R. R. Co., 17 Neb. 647, a case in which this court issued a mandamus to compel the erection of a depot, basing its action on the rule of the common law requiring carriers to furnish adequate facilities to the public, it was said, referring to the section above quoted: "I do not think that this section furnished authority for the interference of the courts to compel the establishment of a depot or station at any point on the line of respondent's road, but on the contrary, it is quite apparent upon
127 the face of the section that every duty thereby imposed is qualified by the words, 'to and from such stations as the trains stop at,' and its application limited to establish depots."

On rehearing granted on the application of the railway company the court while not intimating any doubt of the correctness of its former opinion held that under our constitution and the several sections of our general railway act and particularly of section 75 thereof that all railway companies in the state were required to furnish such "side tracks, turnouts, offices and depots as *shall be necessary*, so that by our former decisions railway companies in this state are required both under the rule of the common law and by force of our statute to furnish such side track depots &c. as may be necessary for the use of the public. (Sec. 18 Neb., 512.)

It may be that the elevator facilities furnished by the two elevators erected and doing business prior to the building of the elevators in question, would under proper management accommodate the trade at that station, but the condition of the market there, as shown by the evidence, did not afford the grain growers the fair market value of their product. The evidence is undisputed that the price of grain fixed by these elevators was from two to four cents below the fair market value of such grain, and we can conceive of no higher duty required of the defendant company than to

furnish adequate facilities to the farming community that had expended its money in erecting an elevator for the storage and shipment of their own grain, in order to protect themselves
128 against a condition which denied them the fair market price of their produce. If these facilities demanded the extension of the railroad switch at that station within reasonable limits, the power of the state to enforce its construction for the benefit of its citizens, can no more be denied than the power possessed by the state to require the erection of a depot at a point where the interest and the convenience of the citizens demand it, even in the absence of the statute.

It is also urged that the grain received at the elevator in question was designed for shipment to a sister state, that it was an article of interstate commerce, and that application for facilities in the operation of the elevator should be addressed to the Interstate Commerce Commission, and not to the courts of the state. The answer to this is that the record discloses that a great part of the grain received at this elevator was sold in Omaha; but even if this were not the case, the authorities are uniform in holding that produce does not become a matter of inter-state commerce until actually delivered to the carrier to be transported beyond the boundaries of the state.

In Coe *v.* Errol, 116 U. S. 517 the court at page 525 deals with this question in the following words: "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose in which they commence their
129 final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state."

In the case of *In re* Greene, 52 Fed. 113, it is said: "When the (interstate) commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. * * * That neither the production or manufacture of articles or commodities which constitute subjects of commerce and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitutes that inter-state commerce which comes within the regulating power of congress."

In concluding this branch of the discussion we might say that we confess our inability to comprehend the force of the reasoning which conceded to the state the right to regulate and control its own commerce, acting at its pleasure in that regard, so long as it does not burden or impede inter-state commerce, and which at the same time, denies to it, any voice in designating the instrumentalities by which that commerce is to be carried on, and the facilities which the carrier shall afford the shipper.

We do not think the act under consideration is subject *ot* the objection of special legislation urged against it by the defendant. In Hunzinger *v.* State, 39 Neb. 653, the court said: "If the law is general in its terms and restricted by its terms to no particular locality, and operates equally upon all of a group of objects, it is not a special law." In Livingston Building & Loan Ass'n *v.* Drummond, 49 Neb. 200, it was said: "It has been very often decided by this court that if a law is general and uniform throughout the state, operating alike upon all persons and localities of a class who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation, or as being in the nature of special legislation." To the same effect are State *v.* Berka, 20 Neb. 375; State *v.* Graham, 16 Neb. 74; McClay *v.* City of Lincoln, 32 Neb. 412; State *v.* Robinson, 35 Neb. 401; Van Horn *v.* State, 46 Neb. 62.

The third and fourth objections raised by the defendant may be considered together. The building of a side-track upon the defendant's right of way is not a taking of its property. The switch or side-track will be owned by the company and under its control. It remains a part of the line of defendant's railroad, and a part of the public highways of the state. The grain company will have no exclusive use of this side-track. As said in Giffen *v.* C. B. & Q. R. R. Co. 96 N. W. 1014: "The proprietor of an elevator built upon the right of way of a railroad company by permission of the company is a licensee upon the premises, and must operate his elevator, loading cars, therefrom, subject to the right of the company to handle its trains and use the track for switching purposes in the ordinary and usual way of doing such work." While the elevator in the case at bar is built upon the grounds owned or controlled by a grain association adjacent to the defendant's right of way, this will not at all change the rule relating to the use of the side-track. The company may still use the track for its own purposes, and will be under no further obligation to the elevator company than to furnish cars for the transaction of its business, giving it equal facilities with other like companies upon said switch, or upon its right of way.

The case is not similar to that of the Missouri Pacific Ry. Co. *v.* State, 164 U. S. 404, where the Supreme Court of the United States reversed the holding of this court requiring the railway company to furnish a free site upon its right of way for the building and maintenance of a grain elevator. The opinion of this court was reversed upon the sole ground that it required the railway company to grant to the petitioners the right to build and maintain a permanent struc-

ture upon its own grounds without being compensated therefor. In the opinion it is said that the record "Does not present any question as to the power of the legislature to compel the railroad com-
132 pany itself to erect and maintain an elevator for the use of the public, or to compel it to permit to all persons equal facilities of access from their own lands to its tracks * * * for the purpose of shipping or receiving grain or other freight. * * * The order in question was not limited to temporary use of tracks nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way."

That a railroad company may be compelled to construct a switch for the accommodation of the public is recognized in the provisions of the Hepburn Law, as well as by the decisions of the Supreme Court of the United States. In the first section of the Hepburn act it is provided as follows: "Any common carrier subject to the provisions of this act, upon application of any lateral branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral branch line of railroad or private side track which may be constructed to connect with its road where such connection is reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same, and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." If the
133 federal congress may make such provision for the benefit of interstate shippers we can see no reason why the legislature of the state may not protect the domestic shipper by similar legislation. We can see no difference in principle in compelling a company to build a switch connection with another road, and constructing a switch or side-track upon its own right of way for the accommodation and convenience of a domestic shipper.

A statute of the state of Minnesota contains a provision similar to that found in the Hepburn law, requiring a switch connection between two roads for the transfer of traffic, and in the case of Wisconsin N. & P. R. Co. *v.* Jacobsen, the validity of the statute was questioned upon the grounds here urged against the statute under consideration. The Supreme Court of Minnesota, in 74, N. W. p. 893 held: "Where the putting in of a connecting switch at the crossing of two railroads to facilitate the transfer of cars from one road to the other, will benefit both state and interstate traffic held there is concurrent jurisdiction in the state and federal authorities to order the putting in of such connection." And upon appeal to the Supreme Court of the United States, (179 U. S. 287), that court affirmed the opinion of the state court, and held as follows: "The providing at the place of intersection of the two railroads affected by this case ample facilities for transferring cars used in the regular business of the respective lines, and to provide facilities for conducting the business, while it would afford facilities to interstate commerce
134 would not regulate such commerce within the meaning of the constitution. * * * Whether a judgment enforcing trade

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connections between two railroad companies is a violation of the constitutional rights of either or both depends upon the facts surrounding the cases in regard to which the judgment was given." In the body of the opinion it is said: "Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations, have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. Olcott *v.* Fondulac County Supervisors, 16 Wallace 678; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641. U. S. *v.* Joint Traffic Ass'n, 171 U. S. 505. It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation is said to be used for a public purpose * * * The companies hold a public franchise, and governmental supervision is therefore vaild. They are organized for the public interest and to subserve primarily the public good and convenience." In Atlantic Coast Line *v.* North Carolina Corporation Commission, 206 U. S. 19, it is said: "The elementary proposition that railroads from the public nature of the business by them carried on, and the interest
135 which the public have in their operation, are subject, as to their state business to state regulation which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

The evidence taken upon the trial shows that the elevator in question, without any side-track facilities, and doing what is called a scoop-shovel business, shipped about fifty thousand bushels of grain during the year prior to the trial of this action, and that with proper side-track facilities it will double, or more than double its business. Not only is this the case, but the business of the railroad itself would be greatly facilitated by the building of this side-track. Now, the grain has to be hauled from the elevator to the cars in wagons, and but two cars a day can be loaded. With proper side track facilities the same work can be done in from one to two hours—a saving of time and of expense to the shipper, thus clearing the railway track of cars that would otherwise necessarily incumber it for some days. The expense of extending the sidetrack as shown by the defendant's own evidence will not exceed $450.00, while the revenue derived from the shipment of grain will, as otherwise shown, amount to, or exceed, $3,000.00 per annum.

Under the circumstances we think that the demand for an extension of the side-track was reasonable, and that its construction will not cast an undue burden upon the defendant.

136 By such extension the convenience of the shipper will be greatly facilitated, and the interest of the farming community advanced; at the same time the cars of the company will not be

delayed in the loading and their use to other shippers denied during the time now necessarily employed in filling them for shipment. The extended switch will neither impede or burden interstate shipments but it will facilitate such as may be made from this elevator and from the station of Manley.

We recommend an affirmance of the judgment of the district court.

Good, C., and Epperson, C., Concur.

By the COURT: For the reasons above given the judgment of the District Court is affirmed.

137 In the Supreme Court of the State of Nebraska.

STATE OF NEBRASKA, Appellee,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

I, H. C. Lindsay, clerk of the Supreme Court of the State of Nebraska do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleadings and papers filed and all proceedings had in the above entitled cause as the same now remain on file and of record in my office.

Witness my hand and the seal of the Supreme Court of the State of Nebraska hereto affixed at my office in Lincoln, this 20th day of March, A. D., 1908.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of the State of Nebraska.

138 In the Supreme Court of the State of Nebraska.

No. 15122.

THE STATE OF NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

The Missouri Pacific Railway Company, the above named appellant, considering itself aggrieved by the final decision of the Supreme Court of Nebraska, in rendering judgment against it in the above entitled case, hereby prays a writ of error from the decision and judgment to the Supreme Court of the United States, and an order fixing the amount of the supersedeas bond.

And the said The Missouri Pacific Railway Company, appellant, as grounds for the issuance of said writ of error, alleges the following errors in the record and proceedings of said cause.

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First. The Supreme Court of Nebraska, erred in deciding and affirming the judgment of the court below, that the state courts of Nebraska have jurisdiction of the subject matter of the action commenced in the court below, and so decided in the said Supreme Court, and has authority to hear, try and determine the issues thereof, and thereby holding and determining that the legislature of the State of Nebraska had authority to govern and control the instrumentalities of an interstate railroad, including its switches, spurs, sidetracks and elevators.

Second. The Supreme Court of Nebraska erred in holding and deciding that notwithstanding the Congress has legislated upon the precise subject and afforded a complete remedy and designated the tribunal where a remedy may be afforded, the state legislature likewise has authority to legislate upon the same subject and to
139 compel the construction of a switchtrack upon the application of a shipper, tendering interstate as well as intra-state traffic, and also holding that the fine imposed upon the appellant company for its refusal to construct such switch, was done in the rightful exercise of constitutional authority.

Third. The Supreme Court of Nebraska erred in deciding that the subject matter of said suit was not governed by the provisions of the act of Congress to regulate commerce and of the acts amendatory and supplemental thereto.

Fourth. The Supreme Court of Nebraska erred in deciding contrary to section 8 of Article 1 of the Constitution of the Uinted States and contrary to the acts of Congress to regulate commerce and the amendments thereto, that the appellant company was under legal obligations to construct, operate and maintain a switchtrack from its line at Manley, Nebraska, to the elevator of the Manley Co-operative Grain Association and that its failure so to do would subject it to the penalties fixed by the act of the Nebraska legislature passed in relation thereto.

Fifth. The Supreme Court of Nebraska erred in deciding that the appellant company was under legal obligations to construct, operate and maintain a switchtrack from its line of railroad at Manley, Nebraska, to connect with the elevator of the Manley Co-operative Grain Association at said place for the purpose of transporting grain from such elevator, at least fifty per cent. of which was to be transported to points beyond the state of Nebraska, and being in its nature interstate commerce.

Sixth. The Supreme Court of Nebraska erred in deciding that Chapter 105 of the Sessions Laws of 1905 of Nebraska, was not repugnant to, nor in contravention of, nor in conflict with Section 8 of Article 1 of the Constitution of the United States and of the acts of Congress to regulate commerce and of the amendments thereto, when applied to the instrumentalities of an interstate carrier, as such is defined by the act to regulate commerce as amended, and the acts supplementary thereto, approved June 30, 1906.
140 Seventh. The Supreme Court of Nebraska erred in holding and deciding that the said Chapter 105 of the laws of 1905 of Nebraska and the enforcement of the provisions thereof is

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not objectionable as allowing the taking or damaging of private property of the appellant company without just compensation to it, nor as depriving a citizen of its property without due process of law, and further that said chapter in this regard is not violative of, nor repugnant to, the provisions of the Fourteenth Article of amendments to the Constitution of the United States.

Eighth. The Supreme Court of Nebraska erred in holding and deciding that said Chapter 105 of the laws of 1905 of Nebraska, which requires the appellant company without compensation to surrender a portion of its right of way and at its own expense construct, maintain and operate a switch track for the private use of the Manley Co-operative Grain Association at Manley, Nebraska, is not repugnant to or in violation of Section 21 of Article 1 of the bill of rights of Nebraska, which provides:

"The property of no person shall be taken or damaged for public use and without just compensation therefor."

Ninth. The Supreme Court of Nebraska erred in deciding that said Chapter 105 of the laws of 1905 of Nebraska, which requires the appellant company to construct, maintain and operate a switch to any elevator, constructed as near as four feet of the outer edge of the company's right of way, provided that any such elevator so constructed, after the taking effect of said act, in order to receive the benefits of said act, must have a capacity of not less than 15,000 bushels, containing such proviso is not repugnant to or in conflict with that part of Section 15 of Article 3 of the Constitution of Nebraska which provides among other things:

"That the legislature shall not pass local or special laws, nor grant to any corporation, association, or individual, any special or exclusive privileges, immunities or franchises whatsoever."

Tenth. The Supreme Court of Nebraska erred in assuming jurisdiction of said suit in so far as it involves the subject of interstate commerce, towit: Requiring the appellant company to construct, maintain and operate a switch to connect with its interstate
141 railroad at the station at Manley, Nebraska, to connect with the elevator of the Manley Co-operative Grain Association at that point for the carriage and transportation of grain from said elevator, which was at least fifty per cent. interstate traffic.

Eleventh. The Supeme Court of Nebraska erred in deciding that Chapter 105 of the laws of 1905 of Nebraska and other like statutes were not invalid in so far as they attempt to compel the appellant company to construct, maintain, and operate one of the instrumentalities of an interstate railroad.

For which errors the said Missouri Pacific Railway Company appellant, prays that the said judgment of the Supreme Court of the state of Nebraska, *dated* in opinion filed March 5, 1908, be reversed and it be restored to all things it has lost thereby.

JAMES W. ORR,
B. P. WAGGENER,
Attorneys for the Missouri Pacific Railway Company.

STATE OF NEBRASKA, *Supreme Court, ss:*

Let the writ of error above prayed for issue upon the execution of a bond by the Missouri Pacific Railway Company to the State of Nebraska in the sum of Two Thousand ($2,000.00) Dollars. Such bond when approved to act as a supersedeas.

Dated this 17th day of March, 1908.

JOHN B. BARNES,
Chief Justice Supreme Court of Nebraska.

[Endorsed:] 15122. State of Nebraska, Appellee, *vs.* The Union Pacific Ry. Co., Appellant. Petition for writ of error and allowance. Supreme Court of Nebraska. Filed Mar. 17, 1908. H. C. Lindsay, Clerk.

142 In the Supreme Court of the State of Nebraska.

No. 15122.

THE STATE OF NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Assignment of Errors.

Now comes the above, The Missouri Pacific Railway Company, and files herewith its petition for a writ of error and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, it makes the following statement and assignment of said errors:

First. The Supreme Court of Nebraska erred in deciding and affirming the judgment of the court below, that the state courts of Nebraska have jurisdiction of the subject matter of the action commenced in the court below, and so decided in the said Supreme Court, and has authority to hear, try and determine the issues therof, and thereby holding and determining that the legislature of the State of Nebraska had authority to govern and control the instrumentalities of an interstate railroad, including its switches, spurs, sidetracks and elevators.

Second. The Supreme Court of Nebraska erred in holding and deciding that notwithstanding the Congress has legislated upon the precise subject and afforded a complete remedy and designated the tribunal where a remedy may be afforded, the state legislature likewise has authority to legislate upon the same subject and to compel the construction of a switch track upon the application of a shipper, rendering interstate as well as intra-state traffic, and also holding that the fine imposed upon the appellant company for its refusal to construct such switch, was done in the rightful
143 exercise of constitutional authority.

Third. The Supreme Court of Nebraska erred in deciding

that the subject matter of said suit was not governed by the provisions of the act of Congress to regulate commerce and of the acts amendatory and supplemental thereto.

Fourth. The Supreme Court of Nebraska erred in deciding contrary to section 8 of Article 1 of the Constitution of the United States and contrary to the acts of Congress to regulate commerce and the amendments thereto, that the appellant company was under legal obligations to construct, operate and maintain a switchtrack from its line at Manley, Nebraska, to the elevator of the Manley Co-operative Grain Association and that its failure so to do would subject it to the penalties fixed by the act of the Nebraska legislature passed in relation thereto.

Fifth. The Supreme Court of Nebraska erred in deciding that the appellant company was under legal obligations to construct, operate and maintain a switchtrack from its line of railroad at Manley, Nebraska, to connect with the elevator of the Manley Grain Association at said place for the purpose of transporting grain from such elevator, at least fifty per cent. of which was to be transported to points beyond the state of Nebraska, and being in its nature interstate commerce.

Sixth. The Supreme Court of Nebraska erred in deciding that Chapter 105 of the Session Laws of 1905 of Nebraska, was not repugnant to, nor in contravention of, nor in conflict with section 8 of Article 1 of the Constitution of the United States and of the acts of Congress to regulate commerce and of the amendments thereto, when applied to the instrumentalities of an interstate carrier, as such is defined by the act to regulate commerce as amended, and the acts supplementary thereto, approved June 30, 1906.

Seventh. The Supreme Court of Nebraska erred in holding and deciding that the said Chapter 105 of the laws of 1905 of *of*
144 Nebraska and the enforcement of the provisions thereof is not objectionable as allowing the taking or damaging of private property of the appellant company without just compensation to it, nor as depriving a citizen of its property without due process of law, and further that said chapter in this regard is not violative of, nor repugnant to, the provisions of the Fourteenth Article of amendment to the Constitution of the United States.

Eighth. The Supreme Court of Nebraska erred in holding and deciding that said Chapter 105 of the laws of 1905 of Nebraska, which requires the appellant company without compensation to surrender a portion of its right of way and at its own expense construct, maintain and operate a switch track for the private use of the Manley Co-operative Grain Association at Manley, Nebraska, is not repugnant to or in violation of Section 21 of the bill of rights of Nebraska, which provides:

"The property of no person shall be taken or damaged for public use without just compensation therefor."

Ninth. The Supreme Court of Nebraska erred in deciding that said Chapter 105 of the laws of 1905 of Nebraska, which requires the appellant company to construct, maintain and operate a switch to any elevator, constructed as near as four feet of the outer edge of the

company's right of way, provided that any such elevator so constructed, after the taking effect of said act, in order to receive the benefits of said act, must have a capacity of not less than 15,000 bushels, containing such proviso is not repugnant to, or in conflict with that part of section 15 of Article 3 of the Constitution of Nebraska which provides among other things:

"That the legislature shall not pass local or special laws, nor grant to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises whatsoever."

Tenth. The Supreme Court of Nebraska erred in assuming jurisdiction of said suit in so far as it involves the subject of interstate commerce, to wit: Requiring the appellant company to construct, maintain and operate a switch to connect with its interstate
145 railroad at the station at Manley, Nebraska, to connect with the elevator of the Manley Co-operative Grain Association at that point for the carriage and transportation of grain from said elevator, which was at least fifty per cent. interstate traffic.

Eleventh. The Supreme Court of Nebraska erred in deciding that Chapter 105 of the laws of 1905 of Nebraska and other like statutes were not invalid in so far as they attempt to compel the appellant company to construct, maintain, and operate one of the instrumentalities of an interstate railroad.

For which above stated errors the appellant, The Missouri Pacific Railway Company, prays that the judgment of the Supreme Court of the State of Nebraska, dated March 5, 1908, be reversed, and that it be restored to all things which it has lost thereby.

JAMES W. ORR AND
B. P. WAGGENER,
Attorneys for the Missouri Pacific Railway Company.

[Endorsed:] 15122. State of Nebraska, Appellee, *v.* Missouri Pacific Ry. Co., Appellant. Assignment of Errors. Supreme Court of Nebraska. Filed Mar. 17, 1908. H. C. Lindsay, Clerk.

146 In the Supreme Court of the State of Nebraska.

No. 15122.

THE STATE OF NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Journal Entry of Allowance of Writ of Error and Superseding Judgment.

The appellant, The Missouri Pacific Railway Company, having presented its application for a writ of error to the Supreme Court of the State of Nebraska to correct the judgment rendered by the said court against it in the suit wherein the State of Nebraska was appellee and The Missouri Pacific Railway Company was appellant, and hav-

ing presented with their application their due assignment of errors in that regard, present now a citation to be signed; accordingly it is ordered that said writ of error be allowed and said citation signed upon the said appellant giving to the said appellee a good and sufficient bond in the sum of $2,000.00 conditioned that said defendant shall prosecute its writ of error to effect, and if it fail to make good its plea shall answer all damages and costs, said security and bond to be approved by this court, or one of the justices thereof, and the writ thereunder to be a supersedeas; and thereupon said appellant now presents a bond with a good and sufficient surety in said sum of $2,000.00, as aforesaid, which is approved by the chief justice and ordered filed with the clerk of the Supreme Court of the State of Nebraska.

Approved 3-17-'08.

JOHN B. BARNES,
Chief Justice of Supreme Court Nebraska.

[Endorsed:] 15122. State of Nebraska, Appellee, *v.* Missouri Pacific Ry. Co., Appellant. Journal Entry. Supreme Court of Nebraska. Filed Mar. 17, 1908. H. C. Lindsay, Clerk.

147 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said state, in which a decision could be had in the certain suit between the State of Nebraska, and The Missouri Pacific Railway Company wherein was drawn in question the construction of a clause of the Constitution of the United States, likewise the construction of acts of Congress of the United States enacted in pursuance of such Constitution, and wherein was also drawn in question the validity of a statute of the said state of Nebraska, and of an authority exercised under said state, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was against the title, right, privilege or exemption specifically set up or claimed under the said Constitution and the said statute, and the said decision was likewise in favor of the validity of said statute of said state, and the authority exercised under it, a manifest error has happened to the great damage of the Missouri Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30

days from the date hereof, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
148 of the Supreme Court of the United States, the 17th day of March, in the year of our Lord one thousand nine hundred and eight.

GEORGE N. THUMMEL,
Clerk Clerk *Circuit Court United States,*
District of Nebraska,
By J. A. McCLAY, *Deputy.*

Allowed:
JOHN B. BARNES,
Chief Justice Supreme Court of Nebraska.

[Seal United States Circuit Court, Lincoln Division, District of Nebraska.]

[Endorsed:] 15122. State of Nebraska, Appellee, *v.* Missouri Pacific Ry. Co., Appellant. Writ of Error. Supreme Court of Nebraska. Filed Mar. 17, 1908. H. C. Lindsay, Clerk.

149 In the Supreme Court of the State of Nebraska.

No. 15122.

THE STATE OF NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Bond.

Know all men by these presents, That we, The Missouri Pacific Railway Company, as principal, and National Surety Company of New York, as sureties, are held and firmly bound unto the State of Nebraska, Appellee, in the sum of Two Thousand ($2,000.00) Dollars to be paid to it the said State of Nebraska, to which payment well and truly to be made, we bind ourselves, jointly and severally firmly by these presents.

Sealed with our seals and dates this 17th day of March, 1908.

Whereas, the above bounded appellant in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Nebraska, in favor of said State of Nebraska, against the Missouri Pacific Railway Company, and to supercede the said judgment rendered therein.

Now, therefore, the condition of this obligation is such that if the above named appellant in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged against

it, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE MISSOURI PACIFIC RAILWAY COMPANY.
By JAMES W. ORR,
[SEAL.] *Its Authorized Attorney.*
NATIONAL SURETY COMPANY,
By EDWARD P. HOVEY,
Attorney in Fact,
By THOS. S. ALLEN, *Att'y in Fact,*
Sureties.

Bond approved and to operate as a supersedeas.

JOHN B. BARNES,
Chief Justice.

150 SUPREME COURT, *State of Nebraska, ss:*

I, H. C. Lindsay, Clerk of said Court, do hereby certify that there was lodged with me as such clerk on March 17th A. D. 1908, in the case of State of Nebraska, Appellee, *versus* The Missouri Pacific Railway Company, appellant,

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth, one for the appellant and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Lincoln, Nebraska, this 20th day of March, 1908.

H. C. LINDSAY,
Clerk of Supreme Court of Nebraska.

[Seal Supreme Court of Nebraska.]

151 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The State of Nebraska, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Nebraska, wherein the Missouri Pacific Railway Company, is appellant in error, and you are appellee in error, to show cause, if any there be, why the judgment rendered against the said appellant in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Nebraska, this 17th day of March, 1908.

JOHN B. BARNES,
Chief Justice Supreme Court of Nebraska.

[Seal Supreme Court of Nebraska.]

Attest:

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

PLATTSMOUTH, NEBRASKA, *March* 18, 1908.

I, C. A. Rawls, Attorney of record, for the appellee in error in the above mentioned case, hereby acknowledge due service of the above citation, and enter an appearance on behalf of the said appellee in error, in the Supreme Court of the United States. Service also on us, of copy of petition in error, assignments of error, writ of error, and bond acknowledged.

C. A. RAWLS,
Attorneys for State of Nebraska,
Appellee in Error.

[Endorsed:] 15122. State of Nebraska, Appellee, *v.* Missouri Pacific Ry. Co., Citation. Supreme Court of Nebraska. Filed Mar. 17, 1908. H. C. Lindsay, Clerk. Citation returned. Supreme Court of Nebraska. Filed Mar. 20, 1908. H. C. Lindsay, Clerk.

152 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Nebraska, in the City of Lincoln, this March 20, 1908.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

Clerk's fees for preparing record	$41.00
Prepaid express on same	.35
	$41.35

Endorsed on cover: File No. 21,109. Nebraska supreme court. Term No. 345. The Missouri Pacific Railway Company, plaintiff in error, *vs.* The State of Nebraska. Filed April 13th, 1908. File No. 21,109.